SUPREME COURT, U. S.

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IN THE

Supreme Court of the United States

OCTOBER TERM 1968

No. 1088

THE OFFSHORE COMPANY,

Petitioner,

– AGAINST –

G. & H. OFFSHORE TOWING CO., INC.,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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2. Should not the owner of a tug whose master has been found grossly negligent and who displayed an attitude of callous indifference to the welfare of the tow entrusted to his care be held liable for failure to come forward with evidence as to when and where and under what circumstances the tow was damaged. It is undisputed that the tow was unmanned; that it was delivered to the tug in good condition and was then in every respect seaworthy. It is also undisputed that the tug at all times had sole custody and control of the tow.

3. Does the *res ipsa loquitor* doctrine apply in admiralty with respect to a tug having complete custody and control of an unmanned barge which becomes damaged while being towed in the open unobstructed waters of the Gulf of Mexico while on a voyage from offshore Louisiana to Trinidad?

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No. .....

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

To The Honorable, The Chief Justice And The Associate Justices Of The Supreme Court Of The United States:

Petitioner prays that a writ of certiorari issue to the United States Court of Appeals for the Fifth Circuit to review the judgment of that Court filed on November 27, 1968.

OPINIONS OF THE COURTS BELOW

The opinion of the District Court is reported at 262 F. Supp. 282, 1966 A.M.C. 2172 and is reproduced in Appendix A. The District Court held in favor of libelant and referred the matter to a Special Commissioner regarding damages.

The Special Commissioner's Report and the District Court's opinion confirming same are reported at 1967

A.M.C. 1597, ...; ..... F. Supp. ....., and are reproduced in Appendix B.

The opinion of the Court of Appeals is reported at ..... F. Supp. ....., and is reproduced in Appendix C.

JURISDICTION

The judgment of the Court of Appeals was filed on November 27, 1968. Jurisdiction of this Court is invoked under Title 28 U.S.C. 1254(1).

QUESTIONS PRESENTED FOR REVIEW

1. When a tort feasor has complete custody and control of a barge damaged while in its possession, is it fair to select an arbitrary time approximately 7 hours after the tort feasor's negligence commenced, and to place upon an innocent and injured party the burden of segregating the damage, if any, which occurred prior to such arbitrary time from that which occurred thereafter?

2. Should not the owner of a tug whose master has been found grossly negligent and who displayed an attitude of callous indifference to the welfare of the tow entrusted to his care be held liable for failure to come forward with evidence as to when and where and under what circumstances the tow was damaged? It is undisputed that the tow was unmanned; that it was delivered to the tug in good condition and was then in every respect seaworthy. It is also undisputed that the tug at all times had sole custody and control of the tow.

3. Does the *res ipsa loquitor* doctrine apply in admiralty with respect to a tug having complete custody and control of an unmanned barge which becomes damaged while being towed in the open unobstructed waters of the Gulf of

Mexico while on a voyage from offshore Louisiana to Trinidad?

STATEMENT OF THE CASE

On January 9, 1964, The Offshore Company delivered an all-welded steel barge to the Tug JUNO for towage from offshore Louisiana to Trinidad.

The JUNO's captain, her officers and crew, without exception, all testified that at the time of delivery the barge was in good condition, thus making the testimony unanimous and establishing beyond any doubt that the barge was in fact sound, seaworthy and entirely suitable for the proposed towage, and the district court so found (353).*

The barge is constructed of ½" steel plating and has dimensions of 101' x 80' x 12'. The hull is divided into eight (8) separate watertight compartments.

A generator house, which contained various electrical controls and equipment, is located near the forward starboard corner of the barge's main deck. (See Exhibit 1, photograph reproduced as Appendix F).

The barge was completely unmanned. Libelant had no employee aboard either the barge or the Tug JUNO whose master, officers and crew had complete custody and control of the barge and were fully in charge of her and of her towage. (354)

Towage commenced off the coast of Morgan City, Louisiana at about 5 P.M. on January 9, 1964, en route to Trinidad via Yucatan Strait off the western tip of Cuba (See Exh. 3, a chart reproduced in Appendix H). The next time any employee or representative of The Offshore Company saw the barge was on January 21, 1964 at Key West, Flor-

* References unless otherwise stated are to pages of the original record on appeal and reproduced in Appendix A.

ida, some 12 days after towage commenced, at which time the barge was in damaged condition. (357)

The damage falls into two separate and distinct categories: (a) Physical damage to the forward end of her ½" steel plated hull, which had been forcibly holed, dented and punctured and (b) damage to the electrical equipment within the generator house located on the main deck of the barge at her forward, starboard side.

Upon arrival at Key West, the barge was down ten feet six inches (10'6") by her head. Her main deck port side, forward, was at sea level. Her main deck starboard side, forward, was ten inches (10") under water.

When asked for an explanation as to what had happened, the tug's master and officers said that they did not know. (357)

The Offshore Company filed a libel in the United States District Court for the Southern District of Texas, Houston Division, against the Tug JUNO, *in rem*, and against her owner, G. &. H. Offshore Towing Company, Inc., to recover damages for (a) cost of repairing the forward end of the barge's ½" steel bow plating, (b) cost of repairs to electrical equipment in the generator house located on the main deck of the barge and (c) loss of use of the drilling barge.

The Offshore Company had no knowledge as to what took place during towage and all testimony on that subject was given by the tug's personnel. The tug's navigator, Captain Williams, testified that the barge handled very well and that everything proceeded normally for the first seven days of towage; that at about daybreak on January 17, 1964, he noticed that something was wrong with the barge and summoned the tug's master, Captain George E.

Ives, to discuss the matter with him. This occurred, according to the navigator, at about 5:30 A.M. and the Court so found. (355)

Although the master and the navigator knew of trouble at about 5:30 A.M. on January 17, the first entry in the tug's log concerning the barge appears in connection with an entry at 0830 which states (Ex. 4, log book):

> "Offshore 58# seems to be going down by the bow. Keeping close watch on rig."

The next entry is for 12 o'clock noon, reading:

> "Offshore 58# has settled by head app. 3 ft. Tug and tow rolling and pitching heavily to very rough N.W.'ly sea. Cannot contact marine operators."

Surprisingly, the JUNO made no reduction in speed and no change of course at any time after the Captain and navigator discussed the barge's condition at daybreak on January 17; nor was there any reduction in speed or change in course after either the 0830 entry or the 12 o'clock noon entry.

Towage continued in the same fashion during the early morning hours of January 18 until 0600 when, after the barge was known to be down by her head, the tug's engine speed was *increased*.

The log entry for 0600, January 18, 1964, reads:

> "Increase engine speed to 600 r.p.m. Sea moderating some extent."

The 12:00 noon entry for January 18 reads:

> "Tug and tow rolling heavily at times to moderate Rough N'ly sea. Offshore 58# is down by head app. 4-5 ft."

In spite of the worsening condition of the barge, towage continued until 12:30 at which time the JUNO personnel decided, for the first time, to stop the tug and to circle, but not board, the rig. The tug and tow were then about sixty miles northwest of the Yucatan Strait. (356)

The JUNO changed course at about 3 P.M. that afternoon, January 18, 1964 and headed toward Tortugas, en route to Key West. Towage was still continued at full speed and still no effort whatever was made to board and inspect, discover the cause of the trouble and alleviate, correct or minimize the damage. Full speed was maintained throughout January 18, 19, 20 and 21, 1964. The tug passed Tortugas and proceeded on to Key West without stopping. (356)

No effort was made to put into any port of refuge at or near Tortugas, such as Garden Key, which is near the western tip of the string of keys jutting into the Gulf of Mexico from the southern tip of Florida, or any other number of locations where the barge could have at least been inspected.

Libelant argued to the district court that the JUNO's failure to inspect or take any remedial action at daybreak on January 17, 1964, made it incumbent upon the JUNO's personnel to come forward with a reasonable explanation of what happened pursuant to the rule in *Chemical Transporter, Inc.* v. *M. Turecamo, Inc.*, 290 F. 2d 496 (2 Cir., 1961); *Sternberg Dredging Co.* v. *Moran T.&T. Co.*, 196 F. 2d 1002 (2 Cir., 1952; *The CLARENCE HOWLAND*, 16 F. 2d 25 (2 Cir., 1926); *American Bridge Division* v. *Roen Steamship Co. and Tug JOHN PURVES*, 328 F. 2d 838 (7 Cir., 1964); and *the ANACONDA*, 164 F. 2d 224 (4 Cir., 1947).

Libelant further argued that this is a classic *res ipsa loquitor* case in that the barge was delivered to the tug in

good seaworthy condition; the tug had complete custody and control of the barge at all times; the tug and tow were navigating in the Gulf of Mexico in an area where the water is deep and no obstruction exists; and that damage of the type inflicted upon ½" plating does not normally occur in open waters of the Gulf of Mexico.

An intimation was made to the effect that there might have been some floating logs which might have inflicted the damage to the forward end of the barge, but there was no proof that floating logs were in fact present or that they struck the barge or that they could have caused the damage in question. (358, 359)

Respondent argued to the District Court that even though it had sole custody and control of the barge and even though libelant had no employee or other witness board either the tug or the tow, libelant nevertheless was obligated to prove specific acts of negligence upon the part of those in charge of the Tug JUNO with respect to the cause of damage to the bow plates.

Separate and apart from what damaged the bow plating and caused the barge to commence taking water, is the question of negligent lack of care of the barge after the JUNO's officers knew or had reason to know that something was amiss. In this connection, libelant argued that the JUNO's failure to do anything whatsoever at daybreak on January 17, when the navigator was sufficiently alarmed to call the Captain's attention to the condition of the barge, was negligence; that the JUNO's entire course of conduct from daybreak on January 17 to 0600 on January 18, when speed was increased to 600 r.p.m., was additional negligence; and that the tug's conduct from the time course was changed at 3 P.M. on January 18 for Tortugas and then to Key West was a continuation of the same disregard for

the welfare of the barge which started at daybreak on January 17, 1964.

From daybreak on January 17 to the time course was changed at about 3 P.M. on January 18, the tug JUNO was stemming the current of the Gulf Stream and by proceeding against the current without reduction in speed (364), seas would necessarily be forced into the barge's hull. The flooding of the three forward compartments did not do any material damage, as those compartments were void spaces. However, said flooding permitted the bow of the barge to sink progressively deeper into the water so that the barge's main deck, forward, tilted from a horizontal position and came closer and closer to the surface of the water as the towage continued, until ultimately the leading edge of the main deck was awash. This, in turn, permitted seas to come on deck, swirl about and enter the generator house. The salt water damaged electrical equipment in the generator house.*

The district court accepted substantially all of libelant's contentions except the first (that the rule of the *Chemical Transporter* and *Sternberg* cases controlled). Even as to that point the district court stated (359):

> "In my judgment, the question (of law) is very close."

With regard to the other contentions, the district court stated (363):

> "The second prong of libelant's attack is better taken. The failure to take prompt action for relief of the Barge, after discovery of her difficulty, shows such a lack of judgment and skill on the part of the JUNO's

* Most of the costs of repairs related to the contents of the generator house. The cost of welding the punctures in the bow plating was relatively small.

officers as to render her liable for damages which result therefrom."

The court directed in its memorandum that libelant should recover damages resulting from the delay in getting the barge to Key West calculated as though the delay had begun *no later* (emphasis added) than noon on January 17 (367), and further directed proctors for libelant to submit an appropriate decree which would, among other things, provide for appointment of a Special Commissioner to hear and report in respect of libelant's damages.

Proctors for libelant prepared and submitted a proposed decree reading in part as follows:

> "ORDERED, ADJUDGED and DECREED that libelant, The Offshore Company, as owner of the drill barge Rig 58, recover of and from respondents, G. & H. Offshore Towing Co., Inc., and the Tug JUNO whatever damages or losses it sustained that resulted from the events that took place after barge 58 was holed on or about January 17, 1964, in connection with respondents' delay in getting her to a port of refuge at Key West, Florida, and after said barge was known by respondents to be down by her head and in need of assistance, * * *"

Proctors for respondents ojected to the terminology and, after a hearing before the court, obtained a decree reading in part as follows:

> "ORDERED, ADJUDGED and DECREED that libelant, The Offshore Company, as owner of the drill barge Rig 58, recover of and from respondents, G. & H. Offshore Towing Co., Inc. and the Tug JUNO, the damages, if any, resulting from the delay *after* noon on January 17, 1964, in getting the barge to Key West." (emphasis added)

Libelant argued to the district court that no arbitrary time should be selected; that the first acts of negligence (apart from the initial damage to the hull of the barge) occurred at or about daybreak on January 17 and that libelant was entitled to recover, pursuant to the district court's decision, all damages flowing from any negligence after the initial impact, and should not be limited to whatever damage occurred after the arbitrarily selected time of 12 o'clock noon, January 17, 1964.

However, the district court held otherwise and signed the decree proposed by proctors for respondents and referred the question of damages to a Special Commissioner.

The Special Commissioner, strictly construing the decree, held that by noon on January 17, with the bow down some three feet (3') and seas breaking over the deck, the contamination of the electrical equipment inside the generator house had begun and concluded that the generator house would probably have contained no less water upon arrival at Key West, and that the electrical and mechanical equipment therein would have been wetted to an equal extent by salt water and sweat, had the JUNO altered course for Key West no later than noon on January 17. (Appendix B)

The Special Commissioner placed the entire burden on libelant, an innocent party who had nothing to do with the gross negligence of the JUNO, of segregating the amount of damage, if any, to electrical equipment within the generator house before 12 o'clock noon on January 17 from that which occurred thereafter, and recommended that the district court make no allowance to libelant for damages.

Libelant filed exceptions to the Special Commissioner's report, which were overruled, and a decree was entered dismissing the libel.

The Offshore Company filed an appeal to the United States Court of Appeals for the Fifth Circuit from the decree of the district court.

A quorum of the Court of Appeals affirmed. (Appendix C)

REASONS FOR GRANTING THE WRIT

1. The decision of the Court of Appeals for the Fifth Circuit is in conflict with several decisions of this court which hold that a tort feasor cannot avoid payment of compensation on the grounds that such compensation cannot be measured with exactness and precision. It also conflicts with decisions of state and other Circuit Courts to the same effect.

The district court disallowed recovery of the cost of repairing bow damage on the theory that libelant failed to prove negligence in connection with the cause of that damage, but held that the JUNO's failure to take prompt action for relief of the barge, after discovering that she was going down by the bow, showed such lack of judgment and skill on the part of her officers as to render her liable for the damage resulting therefrom (363), which consisted mostly of damage to the contents of the generator house.

The Special Commissioner, using the arbitrary time of 12 o'clock noon, many hours after the barge was known to be going down by her head, commented that by that time, with the bow down some three feet and seas breaking over the deck, the contamination of the contents of the generator house had begun, and he recommended that no allowance for damage be made because libelant had not met its alleged burden of proof of segregating damages.

The Second Circuit held in *Navigazone Libera T.S.A.* v. *Newtown Creek T. Co.*, 98 F.2d 694 (2 Cir., 1938), that when

one of two contributing factors is not the result of actionable fault

> "* * * the single tort feasor cannot be allowed to escape through the meshes of a logical net. He is a wrongdoer; let him unravel the casuistries resulting from his wrong * * *" (p. 697)

The Second Circuit analogized the two contributing factors situation with a situation involving two tort feasors, where the injured party may recover completely from either tort feasor because, as the court put it, if the injured party had to prove the amount of damage caused by each tort feasor, both would escape — an absurd result.

The same holding was reached in *Nassau Sand & Gravel Co., Inc.* v. *Red Star Towing & Transportation Co., Inc.*, 62 F. 2d 356 (2 Cir., 1932), which follows Judge Hough's holding in *The Mason*, 249 Fed. 718, at 720:

> "It is assuredly a settled general rule, though oftenest applied in collision, that a fault in one party, once firmly established, casts upon that party the burden of showing any contributing fault committed by his opponent. * * * The analogue of this rule is applicable to matters of damage, * * * the party in fault upon the merits of the case must bear whatever inconvenience or hardship there may be in proving the exact amount of damages sustained; and, if the party not in fault 'derives incidentally a greater benefit than mere indemnification, it arises only from the impossibility of otherwise affecting such indemnification without exposing him to some loss or burden which the law will not place upon him.'"

The Supreme Court has spoken very vigorously regarding technicalities of proof which permit wrongdoers to escape payment. In *Story Parchment Company* v. *Paterson*

Parchment Paper Company, 282 U.S. 555 (1931), Mr. Justice Sutherland commented at page 563:

> "Where the tort itself is of such a nature as to preclude the ascertainment of the amount of damage with certainty, it would be a perversion of fundamental principles of justice to deny all relief to the injured person, and thereby relieve the wrongdoer from making any amends for his acts. In such case, while the damage may not be determined by mere speculation or guess, it will be enough if the evidence show the extent of damages as a matter of just and reasonable inference, although the result be only approximate. The wrongdoer is not entitled to complain that they cannot be measured with exactness and precision that would be possible if the case, which he alone is responsible for making, were otherwise."

Citing a Michigan case, the Court quoted, at page 564:

> "To deny the injured party the right to recover any actual damages in such cases, because ther are of a nature which cannot thus be certainly measured, would be to enable parties to profit by, and speculate upon, their own wrongs, encourage violence and invite depredation. Such is not, and cannot be the law, though cases may be found where courts have laid down artificial and arbitrary rules which have produced such a result."

And again, at page 565:

> "such reasonable and probable estimates, as in the exercise of good sense and sound judgment they shall think will produce adequate compensation. There is no sound reason in such a case, as there may be, to some extent, in actions upon contract, for throwing any part of the loss upon the inured party, which the jury believed from the evidence he had sustained; though the precise amount cannot be ascertained by a fixed rule, but must be matter of opinion and probable estimate. *And the adoption of any arbitrary rule in*

> *such a case, which will relieve the wrongdoer from any part of the damages and throw the loss upon the injured party, would be little less than legalized robbery.*" (emphasis added)

Drill Barge 58 had been specially prepared for this towage and was found by the court to be in good condition upon delivery to the Tug JUNO. Seven days later she was in damaged condition.

At daybreak on January 17, 1964, a perceivable list was detected, but there was nothing to indicate that any water had entered the generator house or damage the equipment therein at that time.

The Special Commissioner and the courts below placed upon the innocent and injured party an impossible burden of proof, which was led to an absurd result. The decision should be reversed.

2. The decision of the Court of Appeals for the Fifth Circuit conflicts with decisions of the Second, Fourth and Seventh Circuit Courts regarding inferences to be drawn and burden of establishing freedom from fault in connection with damage to a tow where the tug's navigation has been found negligent.

In *Sternberg Dredging Co.* v. *Moran T. & T. Co.*, 196 F. 2d 1002 the Second Circuit, by L. Hand, C.J., considered an appear where a dredge showed a perceptible list at 4:30 and sank 3 hours later at 7:30 P.M. The tug had done nothing but continue at half speed after discovering the list.

The Second Circuit held that failure to do anything upon noticing the list is actionable negligence and that the tug was charged with the burden of producing evidence that her fault did not cause the damage, stating at page 1006:

> "We do not forget that Stevens v. The White City, supra, 285 U.S. 195, 52 S.Ct. 347, 76 L.Ed. 699, estab-

> lished it that a towing contract does not make the tug bailee of her tow; but it does not follow that she should not be charged with the burden of producing evidence that her fault did not cause the damage; and, quite regardless of whether there is any general rules, it is enough in the case at bar that the tow had no power to show what in fact caused the disaster; and that, if the tug had done her duty, the cause would probably have been disclosed. It is often a controlling factor in deciding where to throw the burden of producing evidence — and obviously it ought to be — that the proper party to charge is he who alone could discover the truth."

On rehearing, 200 F. 2d 603, the Second Circuit stressed that the dredge should have been inspected when the list appeared.

The opinion of the Second Circuit in *Chemical Transporter, Inc.* v. *M. Turecamo,* 290 F. 2d 496, was also written by Judge L. Hand. In that case both the barge and the tug were at fault, but the tug's fault occurred after the consequences of the barge's fault had become apparent.

The barge's fault consisted of a hole in the aftertank 5′ below deck, 3″ x 5″ in size. It was contended that after the barge was loaded, the tank filled from water coming through the hole which had been brought below the water line.

The tug's fault was failure to adapt its navigation after the barge's plight became apparent.

The Circuit Court affirmed the district court's action holding the tug at fault for improper navigation after discovery of the tow's position of peril, then, on its own motion, raised the question of divided damages as follows (497):

> "The tug was therefore guilty of negligence and was liable; and the question arises whether the case does not fall within the ordinary doctrine that damages are

> divided when both parties are at fault. Neither party has raised the point in the case at bar, but we will pass on it now because the answer is clear, at any rate in this court. In at least four decisions we have passed upon carelessness of a tug that caused damage to another vessel, which was herself also guilty of an earlier fault, contributing to the result; and we have held that, if the fault of the earlier vessel was obvious to the tug in time for the tug to accommodate her own navigation to the emergency, the tug alone was liable. *Henry DuBois Sons Co.* v. *Pennsylvania R. Co.*, 2 Cir., 47 F. 2d 172; *The Perseverance*, 2 Cir., 63 F. 2d 788; *The Sunday*, 2 Cir., 122 F. 2d 325; *Sternberg Dredging Co.* v. *Moran Towing & Transp.*, 2 Cir., 196 F. 2d 1002. In *The Cornelius Vanderbilt*, 2 Cir., 120 F. 2d 766, we assimilated this situation to that of 'last clear chance', and, indeed, that is what it is. When the fault of the first vessel appears or should be evident to the second early enough for the second to escape injury to the first vessel herself, she must do so, if no more is required than a change in navigation of the second vessel which involves no further burden than inconvenience. We can see no reason why because the first vessel has imposed so trifling a burden on the second, she should be punished by the loss of relief for the injuries which the second has caused her. We do not mean to question the validity of dividing damages when the faults are simultaneous or substantially so, but cases such as that at bar demand a different treatment."

The decision of the Court of Appeals for the Fifth Circuit in this case also conflicts with decisions of the Fourth Circuit in *Detyens* v. *Marine Industries, Inc.*, 349 F. 2d 357 (4 Cir., 1965) and of the Second Circuit in *American Bridge Division, United States Steel Corporation* v. *Roen Steamship Company*, 328 F. 2d 838 (1964). In the latter case, at page 839, the Court cited and followed the *Sternberg* case, supra, holding a tug at fault for failure to take any precautions when the barge was known to be taking on water and gradually becoming lower at the bow.

See also *Appeal of Cahill*, 124 F. 63 (2 Cir.,), *Coleman* v. *Aiken*, 242 F. 239 (5th Cir.,) and *The Joseph F. Clinton*, 250 F. 977, 979 (2 Cir.,).

According to the holdings of the above cited cases, Drill Barge 58 was entitled to some effort on the part of the JUNO after her navigator was sufficiently alarmed to discuss the barge's condition with the Captain at daybreak, but no effort of any kind was made, such as reduction in speed or a change in course. The barge was entitled to that effort at the time the question first arose — not seven hours later at an arbitrary time of 12 o'clock noon, January 17, 1964. The JUNO should be held at fault for failure to inspect and failure to even attempt to aid its tow.

3. The doctrine of res ipsa loquitor applies in admiralty with respect to a tug having complete custody and control of an unmanned barge which becomes damaged while being towed in the open unobstructed waters of the Gulf of Mexico while on a voyage from offshore Louisiana to Trinidad.

The ruling of the court below not only places the Fifth Circuit in conflict with the Second Circuit in *Appeal of Cahill*, 124 Fed. 63 and *The Joseph F. Clinton*, 250 Fed. 977, 979, and the Fourth Circuit in the Anaconda, 164 F. 2d 224, but also in conflict with its own decision, rendered by a different panel, in *Bisso v. Waterways Trans. Co.*, 235 F. 2d 741 (5 Cir., 1956).

The district court, in addition to finding that the barge was in good condition at time of delivery, found that "she and her sister ships previously had been towed without incident to practically all the offshore oil producing areas of the world" (353), and further found that "the damage had obviously been inflicted by some heavy object or objects which had come in violent contact with the hull during

the towage' (357) which consisted of "5 holes which from the pictures in evidence appear to vary in size from a split perhaps 2" wide to a puncture about the size and shape of a football" (357).

Exhibit 3, a chart of the Gulf of Mexico, shows that the depth of water was several hundred fathoms and that there were no fixed obstructions or derelicts along the route being followed by the flotilla.

In short, there was nothing along the flotilla's route which could cause damage to the bow of the barge except the tug and the tug's towing gear.

These circumstances plus the fact that the barge was unmanned and completely in the custody and control of the tug result in a presumption of negligence on the part of the JUNO. This rule is illustrated by *Bisso* v. *Waterways Trans. Co.*, supra:

> "This brought into play the sensible rule that, even though the engagement is in contract so that the duty of the tug toward the tow is that of due care only, with the consequent burden of the tow of establishing negligence [citing cases] a stranding which occurs under circumstances which ordinarily results in no such casualty puts on the tug the obligation of some satisfactory explanation. 'When an accident occurs to the tow the action is ex delicto and the burden is on the tow to show negligence on the part of the tug. However, circumstances may create a strong presumption of negligence. In that event the burden is on the tug to rebut the prima facie case or, at least, to show a reasonable excuse for the accident other than its own negligence . . . '" 235 F. 2d 741 at p. 744.

The JUNO is charged with the burden of proof, pursuant to the above cited cases, that she was in no way responsible for the damage to the barge's bow. Having failed

to establish the cause of bow damage, the JUNO should be held at fault for all damage sustained by the barge.

4. The decisions of our courts in cases such as this have wide applicability relating to the measure of damages, implicit in most litigation, and the results of these decisions, both as to merits and damages, are of substantial concern to the shipping public.

Adoption of an arbitrary rule which relieves a wrongdoer from payment of any part of the damages and throws the loss upon the innocent and injured party is, as stated by a Michigan court, little less than legalized robbery, and should not be allowed to stand as a yardstick applicable in this or any other case where an unjust burden is thrown on an injured party.

In addition to public interest and widespread applicability, it is manifestly wrong for a party who has been found guilty of "gross negligence" and "callous indifference to the welfare of the tow" to avoid liability on the merits for damages sustained while the barge was in such party's exclusive custody control.

The wide applicability of towage can be illustrated by comparison with the Mississippi River system, which is only a small part of our overall transportation system, including, among others, the Great Lakes, Atlantic Seaboard, Pacific Seaboard, and international towage to various parts of the world. Tonnage for 1966 on the comparatively short Mississippi River System from Minneapolis to the Gulf of Mexico was 193,950,405, the equivalent of transportation of one ton of freight around the earth at the equator 2,722,452 times.

The Gulf Intracoastal Waterway and its connecting inland and Gulfcoast streams supported in 1966 traffic involv-

ing 321,756,407 tons. (Corps of Engineers, "Mississippi River Navigation", March 1968 Ed. pp. 5 and 6.

The importance of the effect of opinions of the courts below may be realized when considered in conjunction with the vast amount of towage in coastal and international waters.

There is the added fact that the district court in this case, making specific reference to *Detyens Shipyards, Inc.*, v. *Marine Ind. Inc.*, 349 F. 2d 357 (4 Cr., 1965); *Bisso* v. *Waterways Trans. Co.*, 235 F. 2d 741 (5 Cir., 1956); *Sternberg Dredging Co.* v. *Moran T.&T. Co.*, 196 F. 2d 1002 (2 Cir., 1952), on Reh. 200 F. 2d 603; *The Anaconda*, 164 F. 2d 224 (4 Cir., 1947); *Simpkins* v. *Morrison & Sons*, 107 F. 2d 121 (5 Cir., 1939); *The Sterling Tompkins*, 56 F. 2d 740 (2 Cir., 1932); and *The Clarence P. Howland*, 15 F. 2d 25 (2 Cir., 1926), stated that there was a difficult question as to which line of cases to follow, then declined to apply the rule prevalent in the Second, Fourth and Seventh Circuits, saying that the opinions of those courts pay lip service to *Stevens* v. *The White City*, 285 U.S. 1955, but find liability on nebulous grounds.

A quorum of the Fifth Circuit, with one Circuit Judge not participating in the final draft, affirmed, thus casting doubt and confusion on an area of law which theretofore was clear, at least in the Second and Fourth Circuits and probably clear in the Fifth Circuit.

CONCLUSION

Petitioner respectfully submits that the reasons stated in this petition are of importance sufficient to justify the review of the judgment of the Court of Appeals for the Fifth Circuit by writ of certiorari.

It prays, therefore, that the writ issue and that, upon its review, this Honorable Court be pleased to order the judgment of the Court of Appeals reversed and the cause remanded for further proceedings consistent with the doctrine that the owner of a tug whose master has been found grossly negligent and who displayed an attitude of callous indifference to the welfare of the tow entrusted to his care should be liable for its failure to come forward with evidence as to when and where and under what circumstances the tow was damaged; and, in any event, that there is no justification for the adoption of an arbitrary segregation rule which relieves a wrongdoer from payment of damages and casts all losses upon the innocent and injured party, and for such other and further relief as to this Court may seem proper.

Respectfully submitted,

ROBERT M. JULIAN
Counsel for Petitioner

VINSON, ELKINS, SEARLS & CONNALLY
Of Counsel

Dated Houston, Texas, February 24, 1969.

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SUPREME COURT, U. S.

FILED
FEB 25 1969
JOHN F. DAVIS, CLERK

Supreme Court of the United States

OCTOBER TERM 1968

No. 1088

THE OFFSHORE COMPANY,
Petitioner,

– against –

G. & H. OFFSHORE TOWING CO., INC.,
Respondent.

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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APPENDIX A

Opinion of the District Court

IN THE

UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

ADMIRALTY No. 64-H-88

THE OFFSHORE COMPANY, as Owner of
DRILL BARGE RIG 58,

Libellant,

vs.

G & H OFFSHORE TOWING CO., INC.
and the TUG JUNO,

Respondent.

Vinson, Elkins, Weems & Seals
(Mr. Robert M. Julian),
Houston, Texas,
Attorneys for Libellant.

Royston, Rayzor & Cook
(Mr. M. L. Cook),
Houston, Texas,
Attorneys for Respondent.

June 10, 1966

The libel is one to recover for damages suffered by the Drilling Barge 58 on or about January 17, 1964, while she was in tow of the Tug JUNO in the Gulf of Mexico. By cross-

libel, the respondent, as owner of the tug, seeks to recover a portion of the towing charges, which admittedly has been withheld by the libellant; certain additional or "detention" charges by reason of delay resulting from deviation from course for repairs to the 58, and attorneys' fees.

The contract of towage is in writing, and I refer thereto for a detailed statement of its terms. Briefly, it provided that the JUNO would pick up Barge 58 at Beacon No. 7, off the coast of Morgan City, Louisiana, and tow her to Breighton, Trinidad for a fixed sum. It further provided that if the tow put in to port during the voyage for repairs or alterations to the tow, or because of any other reason for which the tow might be responsible, additional compensation at a fixed daily rate was to be paid. A further provision was to the effect that the respondent "shall have the benefit of all exemptions from, and limitations of, liability to which an owner of a vessel is entitled under the Limitation of Liability Statutes of the United States and that they shall have all of the rights, immunities, and exemptions that are accorded to a ship and to a carrier under Title 46 U.S.C.A., Section 1304 (Carriage of Goods by Sea Act).[1]

Drilling Barge 58 is owned by the libellant, The Offshore Company. She is an all-welded steel barge built in 1960. She is approximately 100 feet long and 80 feet wide. Her hull is of ½ inch steel plate. Immediately prior to the voyage she was carefully inspected and surveyed, and was found to be in good order and seaworthy in every respect. She and her sister ships previously had been towed without incident to practically all of the offshore oil producing areas of the world.

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[1] The Carriage of Goods by Sea Act provides, in part (Section 1304), that the vessel shall not be liable for "(a) act, neglect, or default of the master, mariner, pilot or the servants of the carrier in the navigation or in the managment of the ship;".

The Tug JUNO is owned by the respondent and cross-libellant. She is a seagoing tug of 197 gross tons, 100 feet in length, 27 feet in width, and with a draft of 12 feet 8 inches. At the time in question, she was in regular service of this nature, with crew, power, and equipment sufficient to accomplish this towage routinely.

The JUNO took the unmanned Barge 58 in tow at the assigned spot at 3:00 p.m., January 9, 1964, on a 1600 ft. towing cable, and the voyage began. Within the next few days, the flotilla encountered rough and very rough seas. Both vessels rolled heavily. However, nothing untoward occurred during this interval with the tow. On January 10, the JUNO lost all radio contact with marine operators ashore, and on or about January 12 the LORAN set became inoperative. The evidence does not suggest that either of these resulted from the weather conditions. The loss of radio contact is noted in the log and this continued until the radio was repaired January 20.[2] The loss of the LORAN is not noted in the log. Thus, by reason of cloudly and overcast weather which prevented their sighting on the celestial bodies, the officers of the tug were able to fix their locations thereafter only by dead reckoning estimate until about noon of January 18. As hereinafter noted, these estimates were grievously in error and such error was a vital consideration in later decisions.

Shortly after daylight of January 17, the Captain of the JUNO noted that the Barge "seemed to be going down by the head". A log entry at noon of that date was to the effect that "58 had settled by the head app. 3 ft.". At this time both tug and tow were rolling in very rough seas. The Captain reduced speed slightly. As she was out of radio contact and unable to secure instructions, and as the navi-

[2] The Captain put in three hours of overtime repairing the radio. He found two loose wires and repaired them.

gator fixed the JUNO's location by dead reckoning at a point almost through the Yucatan Straits (where the flotilla would have been confronted with a strong adverse current), the Captain felt the wiser course was to proceed. The JUNO held her course. As high a speed was maintained as weather conditions, and safety to the towing cable, permitted.

Between noon and 3:00 p.m. of January 18, a number of important developments took place. The Barge was noted to be down by the head some four to five feet. As the weather had moderated somewhat, speed was increased. Weather also permitted a closer inspection of the Barge, and the tug reversed for this purpose. It was found that she was down to such an extent that her deck was awash. At about this time the weather cleared sufficiently for the officers of the JUNO to determine her correct position. They found — to their surprise — that she had made much less headway than supposed, and rather than being some 90 miles to the southeast of Cape San Antonio (being the western tip of Cuba) and having passed through the Straits of Yucatan, in fact she was some 60 miles to the northwest of the Cape and was only approaching the Straits. Hence, being some 150 miles farther from his destination than he had thought, the Captain of the JUNO changed course for Key West, Florida (thus securing the benefit of a favoring two knot current) as a port of refuge. From that point forward, the weather abated and the remainder of the voyage to Key West was uneventful. No member of the JUNO crew was put aboard the 58, nor was she pumped out, during this interval. She arrived at Key West the evening of January 21 with her bow under water, but still afloat.

Repairs were made in Key West. It was found that Barge 58 had suffered rather widespread damage at various spots completely across her forward end. The steel plating had been dented and punctured, and her welded seams split

open. There were five holes which from the pictures in evidence appear to vary in size from a split perhaps 2 inches wide to a puncture about the size and shape of a football. Sea water had not only entered her hull, but had done extensive damage to the electrical wiring and equipment within her deck housing. The damage had obviously been inflicted by some heavy object or objects which had come in violent contact with the hull during the towage. There is no evidence whatsoever as to precisely what caused the damage. The crew of the JUNO have testified that they have no knowledge of the cause. The Barge, as stated, was unmanned.

The libellant has suggested that the tug may have backed down upon the tow. The crew of the JUNO deny this, and there is no evidence that any damage was apparent to the tug. The Captain of the JUNO suggests contact with partially submerged floating objects such as logs or debris may have caused the damage. Not only did he testify to having seen a number of such partly submerged objects on January 16 (the day before the list was detected), but made an entry in the log book under that date to this effect. I do not credit this testimony. From its location in the log book and from the reservations which I entertain with respect to other testimony of the JUNO's captain,[3] I am of the

[3] As an illustration of my doubts as to the testimony of Captain Ives, I cite the following. It should be borne in mind that the captain (Ives) and the second officer-navigator (Williams) both have testified that during the morning of January 18, and no later than noon of that date, actual sightings on the sun showed the true position of the flotilla, and that this fact was an important consideration in their change of course for Key West. This position showed that the vessel was not in or near the Yucatan Straits and had never been.

The log book notation of 2:55 p.m. of January 18 made by the captain reads in part as follows: "Rig down by head so deep that cannot make any headway against current in Yucatan Straits." Proctor for respondent suggests that this

view that this entry was inserted long after January 16th, with an eye to the trial and the need for an explanation of the damage.

The evidence as recited above is without dispute. An abstract statement of the applicable law also seems to be clear. But it does not follow that decision of the case is a simple task. In my judgment, the question is very close.

The respondent relies on *Stevens* v. *The White City,* 285 U.S. 195 (1932), and the cases which follow this authority, such as *Stall & McDermott* v. *The Southern Cross,* 196 F.2d 309 (5th Cir. 1952); *New Orleans Coal, etc.* v. *U.S.,* 86 F.2d 53 (5th Cir. 1936); *South, Inc.* v. *Moran Towing & Trans. Co.,* 252 F.Supp. 500 (S.D.N.Y. 1965), affirmed by the Second Circuit in an as yet unpublished opinion, *South Inc.* v. *Moran Towing Co.,* May 27, 1966; *Sentell* v. *Gibson,* 173 F. Supp. 737 (S.D. Ala. 1959); *Halliburton Oil Well Cementing Co.* v. *Stellman Trans. Co.,* 123 F. Supp. 568 (S.D. Tex. 1954); *The Lapwing,* 56 F.Supp. 859 (E.D. La. 1944).

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language is ambiguous and does not mean the captain meant the JUNO was in the Straits, but should be read to mean that if he proceeded forward, and thereafter encountered these currents, he could not make headway. This explanation might be accepted were it not for the fact that a statement which Captain Ives made shortly after arriving at Key West on January 21 reads in part as follows: "In the Yucatan Strait January 16, 1964, tug JUNO encountered gale force winds from SE . . . On January 18, 1964, . . . the rig was down by head so far that tug could not make headway against current in Yucatan Strait." Additionally, in his deposition taken November 25, 1965 (p. 25) in referring to the difficulties confronting the JUNO at 8:30 a.m. January 17 (when the list was detected), he states, "You couldn't go slower without going backwards with the current through the Yucatan. We were just about holding our own, and that was about all." Similar expressions as to his position in the Straits appear on pages 29 and 41 of the deposition.

From these authorities, the following principles are established:

(a) An agreement to tow does not impose the liability of an insurer, or of a common carrier, upon the tug;

(b) A contract of towage does not create a bailor-bailee relationship;

(c) An action by the tow against the tug is ex delicto, not ex contractu;

(d) The tow must prove negligence on the part of the tug to recover;

(e) No presumption of negligence arises merely on proof that the tow was in good condition when delivered, and in damaged condition when returned.

The libellant contends that negligence is shown here, not by direct evidence of what happened, but because (it is argued) that the circumstances here create a presumption of negligence — that damage of this nature is not inflicted across the leading edge of a steel plated barge unless there be negligence on the part of the tug — and that the burden is imposed on the tug to explain. In the absence of an explanation showing the tug to be free of fault, it is argued that liability follows. The libellant relies on *Detyens Shipyards, Inc.* v. *Marine Ind. Inc.*, 349 F. 2d 357 (4th Cir. 1965); *Bisso* v. *Waterways Trans. Co.*, 235 F. 2d 741 (5th Cir. 1956); *Sternberg Dredging Co.* v. *Moran Towing & Trans. Co.*, 196 F. 2d 1002 (2nd Cir. 1952), on reh. 200 F. 2d 603; *The Anaconda*, 164 F. 2d 224 (4th Cir. 1947); *Simkins* v. *Morrison & Sons*, 107 F. 2d 121 (5th Cir. 1939); *The Stirling Tomkins*, 56 F. 2d 740 (2nd Cir. 1932); *The Clarence P. Howland*, 15 F. 2d 25 (2nd Cir. 1926). These cases, I believe without exception, cite and recognize the rule of

Stevens v. *The White City* and her progeny, but announce the rule as contended for by libellant. The following quotation from *Bisso* v. *Waterways Trans. Co., supra,* is typical:

> "This brought into play the sensible rule that, even though the engagement is in contract so that the duty of the tug toward the tow is that of due care only, with the consequent burden on the tow of establishing negligence, [citing cases], a stranding which occurs under circumstances which ordinarily results in no such casualty puts on the tug the obligation of some satisfactory explanation. 'When an accident occurs to the tow the action is ex delicto and the burden is on the tow to show negligence on the part of the tug. However, circumstances may create a strong presumption of negligence. In that event the burden is on the tug to rebut the prima facie case or, at least, to show a reasonable excuse for the accident other than its own negligence. . . .' " 235 F. 2d 741 at p. 744.

The other authorities cited by libellant contain similar statements.

I am not sure that the cases may all be reconciled; for while all those cited by libellant pay lip service to *Stevens* v. *The White City,* in a number of instances the courts base the finding of the tug's negligence on what seems to be rather nebulous and uncertain grounds. At any event, the question presented is whether the incident causing the damage is of such nature that it would not normally have happened had the tug exercised due care. In my judgment that is not the case here. In all probability the damage resulted from collision with one or more floating objects on the night of June 16-17. When it is borne in mind that the Barge was riding more than one-quarter mile behind the tug, that she was rolling in very rough seas, and that the damage apparently happened during the hours of darkness, I am of the view that such damage well might occur without knowledge of the tug's crew, though they be in the

exercise of due care, and keeping the most careful watch for her safety. The risk of striking a floating object (if, in fact, this caused the damage) is a peril of the sea, a risk which is borne by the tow [see, *Utah Home Fire Insurance Company* v. *Mechanical Equip. Co.*, 242 F. 2d 513 (5th Cir. 1957) and cases there cited; *New Orleans Coal, etc.* v. *U.S.*, 86 F. 2d 53 (5th Cir. 1936); *Sentell* v. *Gibson*, 173 F. Supp. 737 (S.D. Ala. 1959)], and from which a presumption of negligence does not arise. Hence the libellant has not shown fault on the part of the JUNO causing the initial damage to Barge 58.

The second prong of libellant's attack is better taken. The failure to take prompt action for relief of the Barge, after discovery of her difficulty, shows such a lack of judgment and skill on the part of the JUNO's officers as to render her liable for the damages which result therefrom. Respondent argues that one now has the benefit of hindsight; that the tug had heavy weather, rough seas, a miscalculation of her location, and a lack of communication to contend with; and that when faced with an emergency, the captain of the tug is only required to use his best judgment under the circumstances as they then appear, and that the tug is not to be cast in damages if subsequent events show that some other course might have been more advantageous. There is force in this argument. But much of the JUNO's difficulty was of her own making. She did not know her location because her electronic gear had gone out and was not repaired. She was unable to communicate with her owners, or those of the tow, or to receive weather information or other data during the critical period because her radio was inoperative; repaired, apparently with little effort, some few days later. Despite the fact that the condition of the Barge continued to worsen, the JUNO plowed ahead against adverse currents for a period of thirty hours rather than taking immediate advantage of a favoring current toward Key West. I do not credit the testimony of her master that

the seas were so rough that he could not effect the change of course which this would have called for. This conduct shows a callous indifference to the welfare of the tow and no doubt greatly increased the damages which she suffered, for which the tug may not escape responsibility. *Chemical Trans. Inc.* v. *M. Turecamo, Inc.* 290 F.2d 496 (2nd Cir. 1961); *Sternberg Dredging Co.* v. *Moran Towing Co., supra; The Joseph F. Clinton,* 250 F. 977 (2nd Cir. 1918).

Respondent replies to the charge of negligence by reliance on the exculpatory provisions of the Carriage of Goods by Sea Act incorporated by reference in the contract of towage as noted in the opening paragraphs hereof. The answer to this contention is the holding of *Bisso* v. *Inland Waterways Corp.,* 349 U.S. 85 (1955), wherein the Court states:

> "Viewed in the light of this history, we think *The Syracuse, The Wash Gray* and intervening lower court cases together strongly point to the existence of a judicial rule, based on public policy, invalidating contracts releasing towers from all liability for their negligence. Because of this judicial history and cogent reasons in support of a rule outlawing such contracts we now, despite past uncertainty and difference among the circuits, accept this as the controlling rule." Id. at p. 90.

Respondent suggests that *Bisso* was wrongly decided, and that it will soon be overruled; and urges that it should be followed only in cases of inland towing, and where the evidence shows a lack of competition in the towing business. There is evidence here that there is much competition among the seagoing towers. But *Bisso* has been followed as recently as 1963 [*Dixilyn Drilling Corp.* v. *Crescent Towing & Salvage Co.,* 372 U.S. 697 (1963)] without qualification, and I decline the invitation to be the first to overrule it.

From the date of the filing of this libel, every contact between the proctors for the contesting parties has been marked by wholly unnecessary heat and friction. The fix-

ing of bond, production of witnesses for deposition, answers to interrogatories, all have necessitated application to the Court. The respondent has deliberately submitted an admittedly erroneous invoice for the deviation time. Proctor for the respondent states that he learned only on the day of trial that libellant admitted owing an additional amount on the towage fee and was withholding it as an offset — a fact with which the Court was familiar from the first in-chambers conference perhaps a year ago. Proctor for libellant has referred the Court to an accident report, intimating that it pertained to the accident in question, when in fact it related to an entirely different occurrence. Such conduct has not been of assistance to the Court in disposition of the case, and reflects no credit on the able and experienced proctors involved. Zeal in a client's behalf does not require this.

Libellant may recover for damages to the Barge 58 resulting from the delay in getting her to Key West. Respondent and cross-libellant may recover the amount admittedly withheld on the towing fee, and for the deviation calculated as though it had begun no later than noon on January 17. Recovery may not be had for deviation time incurred through fault of the tug. As the invoice on which cross-libellant sought to recover admittedly was false, attorneys fees are not allowed. The foregoing is adopted as Findings of Fact and Conclusions of Law.

Proctor for libellant will submit appropriate decree; will submit same to the proctor for respondent who will either approve it as to form or note thereon that he declines to approve it as to form, in which event he will advise the Court his objections in writing.

Done at Houston, Texas, this 10th day of June, 1966.

s/ BEN C. CONNALLY
United States District Judge

APPENDIX B

Report of the Special Commissioner and the District Court's Confirmation

THE OFFSHORE COMPANY, AS OWNER OF DRILL BARGE RIG 58,

Libellant,

vs.

G & H OFFSHORE TOWING CO., INC., AND THE TUG JUNO,

Respondents.

AND

G & H OFFSHORE TOWING CO., INC.,

Cross-Libellant,

vs.

THE OFFSHORE COMPANY,

Cross-Respondent.

United States District Court, Southern District of Texas, Houston Division,

March 3, 1967.

Commissioner's Report confirmed by the Court (CONNALLY, D. J.),

May 16, 1967.

In Admiralty — No. 64-H-88.

REPORT OF ED BLUESTEIN, JR.
SPECIAL COMMISSIONER ON DAMAGES.

TO THE HONORABLE COURT:

Pursuant to the Interlocutory Decree of the District Court dated July 28, 1966, referring to your Commissioner the assessment and computation of damages herein, a preliminary meeting with counsel was had on August 4, 1966. On

that date, a schedule was established for the exchange of exhibits, the submission of briefs, and the time for commencing the hearings. The formal hearings were on September 15, November 15, November 16, and November 22, 1966. A transcript of the proceedings with exhibits, has been filed with the clerk this date.

BACKGROUND FACTS.

The Offshore Company (Offshore hereafter), as owner of Drilling *Barge 58*, contracted with G. & H. Offshore Towing Co., Inc. (G. & H.) for the latter company's tug *Juno* to tow the unmanned barge from Beacon No. 7, off the coast of Morgan City, Louisiana, to Breighton, Trinidad.

The tow commenced on January 9, 1964. On the morning of January 17, the barge was observed "to be going down by the head." In mid-afternoon on January 18, the *Juno* altered course for Key West, Florida, as a port of refuge. The tug and tow arrived in Key West late on January 21, the barge still afloat, but with her bow under water.

The barge's hull consists of eight watertight compartments. The three compartments across the bow were found to have been punctured in various places by some unknown object or objects coming into violent contact with the hull during towage. Sea water flooded the three forward compartments, and extensive damage also was found to the electrical wiring and equipment in the barge's generator house on deck.

The barge was pumped out and minor repairs of a temporary nature were made in Key West to plug the holes. On January 23, the *Juno*, with the barge again in tow, departed Key West for Trinidad, arriving there on February 13, 1964. Extensive repairs to the barge were carried out in Trinidad, and the barge was ready for use on February 26.

It has been determined by the District Court (1) that G. & H. did not negligently cause or permit the hull of the Drilling *Barge 58* to become holed, but (2) that G. & H. should have deviated for Key West no later than noon on January 17 and was negligent in failing to do so.

The findings of the District Court are contained in its written opinion on liability dated June 10, 1966 A. M. C. 2172, 262 F. Supp. 282.

ISSUES.

As reflected by the opinion and interlocutory decree of the District Court, this action involves both claim and counterclaim. The damage issues may be stated as follows:

1. What damages, if any, resulted to The Offshore Company, as owner of Drilling *Barge 58*, from the negligence of the tug *Juno* in not deviating for Key West, Florida, at or before noon on January 17, 1964.

2. What sums, if any, is G. & H. Offshore Towing Co., Inc., entitled to receive as compensation (at the contract rate of $50.00 per hour plus Key West port charges) for the additional time, if any, that was required to complete the towage to Trinidad beyond the time such voyage would normally require as a result of the deviation into Key West, assuming for the purpose of calculating time, that such deviation commenced no later than noon January 17, 1964.

No issue exists on the right of G. & H. to recover from Offshore the unpaid balance of $19,375 due on the towage contract, which was admittedly withheld by Offshore as an offset against its claim for damages.

THE COUNTERCLAIM OF G. & H.

The latter of the two principal issues set out above is resolved more readily and will be treated first. It appears,

from the absence of any supporting proof, that G. & H. has abandoned its contractual claim for additional compensation based upon such added time as may have been required to complete the towage to Trinidad as a result of the deviation into Key West.

G. & H. called J. R. Bencal, a marine surveyor and consultant, and Capt. George Ives, master of the tug *Juno*, as its only witnesses. Neither gave any testimony which would support a finding that the deviation delayed the completion of the towage to Trindad.

The intended course of towage called for a voyage from Beacon No. 7 off the coast of Morgan City, Louisiana to Trinidad in the British West Indies by way of the Yucatan Straits, keeping to the west of Cuba. The tow deviated to Key West, Florida, before reaching the Yucatan Straits. After making temporary repairs to Drilling *Barge 58* at Key West, the voyage did not resume its original course, but instead proceeded around the east side of Cuba to reach Trinidad.

No estimates were given of the probable time that would have been spent to carry out this voyage as originally planned. The difficulty in making such an estimate is reflected by the sizeable errors in estimating the tow's actual position during the voyage by those in charge of its navigation (as noted in the opinion of the District Court). It is possible that the route taken after deviation did not result in any substantial additional towing time. At any rate, no basis exists for determining that additional time was required to complete the tow, and the burden of proof was on G. & H. to show such facts.

I find accordingly that G. & H. Offshore Towing Co., Inc., is not entitled to any compensation pursuant to the towage contract for additional time resulting from the deviation.

By deviating into Key West, certain port charges were incurred by G. & H. The parties, by their respective counsel, have stipulated that the expenses incurred by G. & H. in Key West amounted to $544.30, and that this amount was fair and reasonable and that the expenses were necessary. Offshore, in so stipulating, reserved its right to contest the necessity for the deviation itself. These expenses were primarily to pay the local pilots, the Key West harbormaster and wharfage costs. The negligence of G. & H. played no part in the necessity for incurring these expenses. I find that such expenses would have been required had G. & H. deviated to Key West no later than noon January 17, 1964.

Libellant suggests it would not have been necessary to deviate into Key West had the officers of the *Juno* not failed (quoting the District Court) "to take prompt action for relief of the barge after discovery of her difficulty." Under libellant's theory, they could have heaved to and used normal protective gear to cover or plug the ruptures in the barge hull, and then proceeded on course.

The District Court did not find the officers of the *Juno* negligent for failing to make temporary repairs in very rough seas, and I would decline to so find, if this reference to determine damages required my ruling on this question. As I read the District Court's opinion, the "prompt action" called for by prudent seamanship was an immediate deviation to the nearest port of refuge upon discovering the plight of Drilling *Barge 58*.

I accordingly find that G. & H. Offshore Towing Co., Inc., is entitled to recover the sum of $544.30 of and from The Offshore Company. Whether pre-judgment interest should be allowed to G. & H. on this recovery or on the recovery granted to G. & H. in the Interlocutory Decree for the bal-

ance of $19,375 due on the towage contract is left to the sound discretion of the District Court. No facts developed during the damage hearing would operate against awarding interest to G. & H. from the date the final payment under the towage contract became due. The conduct of G. & H. as developed during the trial on liability should also be weighed, and the District Court is in the best position to do so.

THE CLAIM OF THE OFFSHORE COMPANY.

Offshore contends that it has proved recoverable damages from G. & H. in the amount of $63,335.29, which may be categorized as follows:

1. Temporary repairs in Key West	$ 530.67
2. Repairs at Trinidad	20,804.62
3. Detention at Key West and Trinidad for 10 days at $4,200 per day	42,000.00
Total	$63,335.29

Libellant acknowledges that the hull plating damages, sustained in an unknown manner, are not recoverable under the holding of the District Court. For this reason, libellant makes no claim against G. & H. for the $711 expense of patching the forward end of the barge in Key West, though the amount was stipulated to be fair and reasonable, and the work necessary to repair the barge.

Libellant's position is that all damages to the equipment and machinery in the deck housing and on the main deck, and all detention damages, are recoverable from G. & H. Libellant does not concede that any portion of these damages would have occurred absent the negligent conduct of G. & H.

At the hearings, respondent objected to the admission of repair invoices, expense accounts, summaries of damages,

cost estimates, and related damage materials on the ground, among others, that no showing had been made by libellant that the damages were related to or connected with the negligence of respondent. Respondent also objected to much of the material as not being the best evidence, not shown to be reasonable in amount or necessary, and generally as "not properly proven up." All of libellant's exhibits were marked for identification and made a part of the record, although formal ruling on the admissibility of much of the materials was reserved. A review of the record, and the various exhibits, has been made, and respondent's objections, to the extent ruling thereon was previously reserved, are overruled. A relaxation of formal evidentiary rules is not uncommon in admiralty proceedings, and that approach seems appropriate here. Respondent's objections are considered to go more to the weight than the admissibility of the documents.

Respondent has noted that many of the Trinidad repair invoices on the barge were to Offshore Western, Inc., a wholly owned subsidiary of Offshore, and the evidence indicates Offshore Western, Inc., paid for these. This fact would not prevent Offshore from recovering these sums as damages to its barge. The bareboat charter of the barge from Offshore to Offshore Western, Inc. (Libellant's Exhibit No. 14) provides, in the sixth paragraph, that Offshore shall bear all costs incidental to any loss or damage to the barge not recoverable under insurance. These damages were below the insurance deductible feature on the barge and therefore were not recoverable by insurance. Offshore either has reimbursed Offshore Western for these expenses or is obligated to do so, and Offshore may assert these items against G. & H.

Admitting libellant's documentary exhibits into evidence is not to say that all or any part of the damages reflected

thereby are recoverable from G. & H. The issue is what portion of these damages, if any, was caused by the negligence of G. & H. Before proceeding to the difficult causation and burden of proof problems involved in answering this question, four of the repair or expense items listed on libellant's tabulation of damages (Libellant's Exhibit No. 13) are not considered to be properly included. These items either are not related to the on deck or deck house repair, or were not sufficiently established to permit their further consideration. The items are identified on the exhibit in the following manner:

A. Tarton Metal Co. ..... W. I. $ 83.55
Supplies ..... (U. S. $ 48.73)

B. Ships Service Generator and Distribution Switchboard build by U. S. Navy Dept.

Value prior to tow	$6,500.00	
Value after arrival	$2,000.00	
LOSS	$4,500.00	$4,500.00

C. Charge for crating, trucking, handling, shipping, etc.

II.	$ 8,722.92	
III.	276.76	
IV.	3,278.82	
	$12,278.50	
20%	2,455.70	$2,455.70

D. Labor to chip, scrape, paint, store room — *Jerome* — W.I. ..... $ 539.35
528.11
449.46
269.67

W.I.	$1,786.59	
U.S.	1,042.11	$1,042.11

The Tartan Metal Co. expense (Item A) was shown by the testimony of Henry Snyder, libellant's principal witness on the repairs made in Trinidad, to have been for metal to patch the barge "where the holes were knocked in it" in the leading edge. This type of damage was found by the District Court to have resulted from causes for which G. & H. may not be held responsible. The amount of $83.55 is in British West Indies currency. This is equivalent to $48.73 in United States currency, using the applicable conversion rate of .5833.

The claim of $4,500 for loss in value to the generator switchboard (Item B) before repairs must not be considered where, as here, the item is subsequently repaired. Repairs to the switchboard totalling $4,222.92 were made in Trinidad, as reflected on page two of Libellant's Exhibit No. 13. The item had a value of $6,500 before the tow began, and libellant lists $8,722.92 ($4,500 loss of value and $4,222.92 repairs) as the amount of damages to it. The proper measure of damages would be either the loss in value before repairs or the cost of repairs plus any loss of value after the repairs were completed. Mr. Snyder testified the switchboard was not in as good condition after being repaired as before the voyage, but his statement that it had depreciated "quite a bit" is too vague to permit the inclusion of any sum for loss of value after repairs.

The crating, trucking, handling and shipping charge of $2,455.70 (Item C) was an estimated expense figure based on twenty percent of the cost of goods acquired in the United States and shipped to Trinidad for use in repairing the barge. Mr. O'Kelley, who does cost estimating for libellant, testified that actual cash disbursements were made for crating, trucking, handling and shipping, but that accumulating and keeping these charges would be very difficult. He candidly stated that some supporting invoices were

actually thrown out, and the percent figure applied. While he believed the percent used to be fair and reasonable based upon general experience, he acknowledged that the actual cost might be five percent or forty percent or some other percent in this instance. Under these circumstances, this item is excluded from further consideration as not being properly established.

The last charge (Item D) which is rejected covers chipping and painting by Alfred Jerome. The figures are listed in British West Indies currency, but the conversion to U. S. currency is shown to total $1,042.11. This work went on below the main deck of the barge in storeroom areas located in the hull. Mr. W. L. Ellis, libellant's marine superintendent, examined the barge in Key West, and his testimony is accepted that no damage then existed below deck. Whatever the reason for this work, it may not be considered as a potential item for recovery, since the need for this work did not exist at Key West.

The four items discussed above amount to $8,046.54. Libellant's claim for repairs in Trinidad of $20,804.62 is reduced by that amount, leaving a balance of $12,758.08 to be considered. These expenses were necessary to repair the barge after the voyage, and were fair and reasonable in amount. Whether this sum is recoverable from G. & H. remains in issue.

No allowance for detention damages can be recommended. In order to recover detention damages, more than negligently caused delay must be shown. The claimant must prove a loss which resulted from the delay. The evidence does not establish such a loss.

Prior to the voyage in question, Drilling *Barge 58* lay idle for twelve to eighteen months, tied up near Morgan City, Louisiana. The barge was sent to Trinidad to Off-

shore Western, Inc., a wholly owned subsidiary of libellant, under a bareboat charter from Offshore to Offshore Western, Inc. The latter had a drilling contact with a Texaco subsidiary to drill an unspecified number of wells. This contract had no fixed commencement or termination date, and was subject to termination upon notice. The Texaco contract was not shown to have been prejudiced by the delay in commencing operations, nor were any subsequent contracts for the use of the barge shown to have been lost on account of delay. Stated otherwise, no showing was made that Drilling *Barge 58* lost employment by reason of the delay.

Additionally, the bareboat charter of the barge to Offshore Western, Inc. (Libellant's Exhibit No. 14), provided for a per day payment of $600 to libellant for the barge, with payments of an additional $1,000 per day for a drilling tender and a crewboat. The charter hire for the barge, according to the agreement, began January 9, 1964, the date on which the voyage began. No showing was made that this charter hire was not paid to Offshore for the period of time the barge was being repaired.

Mr. O'Kelley testified for libellant that $4,200 per day was the fair rental value of the drilling unit which included the barge, the drilling tender and the crewboat. He also testified that the actual daily profit for the drilling unit was $1,734. However, $4,200 is the amount Offshore Western, Inc., not libellant, received from Texaco under its contract, and $1,734 is the daily profit of Offshore Western, Inc., on the unit. Offshore Western, Inc., is not a party to this suit, and its detention damage, if any, is not recoverable by libellant.

If a proper method for determining the daily amount of detention damage has been overlooked, and if libellant is entitled to a recovery based upon such rate, I find the period

of time clearly attributable to the negligence of G. & H. to be approximately thirty-three hours. G. & H. negligently delayed twenty-seven hours before deviating for Key West (noon January 17 to 3:00 p.m. January 18), and I find that no more than six additional hours were required to reach Key West as a result of that delay. At noon on January 17 the tow was located approximately 265 miles southwest of Key West. When the tow changed course twenty-seven hours later, the distance to Key West was virtually unchanged. What little distance (approximately twenty-seven miles) the tow had made good during this period was to the southeast, and the relative distance to Key West remained the same. The added six hours which I have placed on the time required to get to Key West after the negligent delay in deviating is to compensate for the decrease in speed the tow could make after the barge settled completely to its maximum. At noon on January 17 the bow was down some three feet. By the time of deviating, the bow was awash.

In addition to the thirty-three hours delay at sea, I find the time spent in repairing the on deck and deck house equipment damage in Key West and Trinidad added six and one-half days to the time the barge otherwise would have been ready for use. The testimony showed the time to prepare a drilling barge for service after a routine voyage varied five to ten days. It took thirteen days in Trinidad to ready Drilling *Barge 58* for use on this occasion.

The question is now reached whether Offshore is entitled to recover from G. & H. for the on deck and deck house damages of $13,288.75 ($12,758.08 in Trinidad and $530.67 in Key West) which the evidence shows was sustained by libellant, and for the six and one-half days spent in repairing this damage, assuming a proper rate for detention.

Although Offshore is a wholly innocent party to the damages it has sustained and is deserving of every reasonable

consideration that can be given, I am unable to find a justifiable basis upon which Offshore may recover its damages from G. & H. in this cause. This conclusion is reached for two reasons. First, I am not convinced from a preponderance of the evidence that the negligence of G. & H. caused or was a substantial factor in bringing about the damages for which recovery is sought. Second, even if the negligence of G. & H. was a substantial factor in causing some damage to Offshore, no showing has been made of what portion of the damages were negligently caused by G. & H.

Not overlooked are the District Court's remarks, contained in its opinion on June 10, 1966, that the conduct of the *Juno* and its master in continuing ahead against adverse currents for thirty hours while the condition of the barge continued to worsen showed a "callous indifference to the welfare of the tow and no doubt increased the damage which she suffered, for which the tug may not escape responsibility." These remarks are not construed to constitute a specific finding by the District Court that the negligence of the *Juno* did in fact cause additional damages to the barge. In the context used the remarks are taken to mean only that the District Court believed that in all probability the evidence on damages would show this conduct increased the damages. The Interlocutory Decree appears to have left the causation question on damages entirely open when it states that Offshore shall recover "the damages, *if any,* resulting from the delay after noon on January 17, 1964, in getting the barge to Key West."

The electrical and mechanical equipment in the generator house was protected from exposure to salt water so long as the barge remained in good trim with eight feet of freeboard, as it was prior to being holed. With the barge originally trimmed slightly down by the stern, water entering or forming in the generator house could drain out the one-half inch limber hole at deck level on the generator

house after door. Actually, except for this drain hole, the house was watertight. Once the barge's trim changed from slightly down by the stern to radically down by the bow, the limber hole lost its drainage utility and became instead the opening through which the damaging salt water entered the generator house to contaminate the contents. By noon on January 17, with the bow down some three feet, and seas breaking over the deck, the contamination had begun.

When the generator house door was opened in Key West, salt water stood at an average depth of eight and one-half inches. Moisture covered the overhead in droplets and the bulkheads were heavily sweating. The polyethelene protective wrapping on the equipment was soaking wet. The electrical and mechanical equipment within the house was badly splashed with salt water, and also was damaged from the heavy sweating.

I have concluded that the generator house probably would have contained no less water upon arrival in Key West, and that the electrical and mechanical equipment therein would have been wetted to an equal extent by salt water and sweat had the *Juno* altered course for Key West no later than noon on January 17. The time to bring the tow in to Key West after deviating was eighty one hours, and the barge's bow was awash the entire time. According to my calculations, deviating at noon on January 17 would still have subjected the barge to being towed with bow awash for forty-eight hours, with her trim radically and adversely altered for the entire distance to Key West. I estimate this trip would have taken seventy-five hours to complete (six hours less e to initially decreased drag), and the first twenty-seven hours would have seen the barge's bow settle until it was awash.

It is possible that the delay caused considerable additional damage to the barge. On the other hand, it also is

possible that the equipment and material on the barge would have required the same amount of repair or replacement even had there been no negligent delay in reaching Key West. No testimony or proof was offered, either from experts, or others, upon which findings could reasonably be based. Whether the delay added to the barge damage, or to what extent, are questions which cannot be answered from the evidence without resort to guesswork.

I believe that Offshore had the burden to establish with reasonable certainty the damages caused by the negligent conduct of G. & H. No recovery of damages may be based upon conjecture or speculation.

If there were credible testimony in the record that the delay in all probability substantially increased the damages, a recovery by Offshore would not be withheld because no exact or precise computation could be made of the increased amount. It would suffice that some reasonably reliable basis was shown upon which an apportionment could be made. Moreover, recovery should not be withheld under circumstances where the damages caused by a negligent party cannot be separated or apportioned, for to do so would penalize the innocent party to the relief of the guilty one.

This record, however, lacks evidence to establish (1) that the negligence of G. & H. caused additional damages, (2) what portion of the total damages was due to the negligence of G. & H., or (3) that the damages negeligently caused by G. & H. were not capable of being reasonably apportioned from the total. Offshore's burden initially was to establish (1) above. It did not do so. However, even if this fact is considered established, I believe Offshore had the additional burden of proving either (2) or (3) above. Finding no evidence in the record upon which either proposition can be supported, Offshore must be denied a recovery for

any damage to the barge, or for any portion of the six and one-half days attributable to repairing this damage.

The questions of causation and burden of proof discussed herein have not been easily answered. If applicable rules have been overlooked or improperly applied or findings erroneously made, the findings on the amount of damages sustained should permit a final determination on review without the necessity for further proof being taken.

Interest on Libellant's Claim.

Since Offshore is not entitled to a recovery, no finding on interest is required. However, should Offshore be found entitled to recover damages from G. & H. arising from this casualty, I would award interest at six percent on such recovery from January 17, 1964.

Costs.

I do not consider the taxation of costs to be within the scope of this reference on damages, and any ruling thereon is left for the District Court to determine as it deems appropriate. Counsel agreed at the outset of the damage hearings that the cost for the original and two copies of the transcript of the damage hearings would be taxable as costs.

Filing.

This report is filed with the clerk of the Court this 3rd day of March, 1967. Prior to the filing of the report, a draft thereof was submitted to counsel for both parties for the purpose of receiving their suggestions, in accordance with F. R. C. P. Rule 53(e)(5). The suggestions received

have been duly considered, and such revisions made as were considered appropriate.

United States District Court, Southern District of Texas,
Houston Division,

May 16, 1967.

In Admiralty — No. 64-H-88.

Vinson, Elkins, Weems & Searls
(Robert M. Julian, of Counsel),
Attorneys for Libellant.

Royston, Rayzor & Cook
(M. L. Cook, of Counsel),
Attorneys for Respondent.

ON MOTION TO CONFIRM — AND EXCEPTIONS TO —
THE REPORT OF THE SPECIAL COMMISSIONER

BEN C. CONNALLY, D. J.:

Following the filing of memorandum opinion herein June 10, 1966, this matter was referred to ED BLUESTEIN, JR., Esq., a member of the bar of this Court, as Special Commissioner to determine the damages. After hearing, such Special Commissioner on March 3, 1967, filed his report. It is largely in favor of the respondent and cross-libellant G. & H. Thus G. & H. has moved to confirm the report, and Offshore urges a number of exceptions thereto. By reason thereof, and further by reason of the fact that other issues as to damage remain undecided, I make the following rulings.

Such report notes that G. & H. has abandoned its contractual claim for additional compensation based on the added time required to complete the towage to Trinidad as result of the deviation into Key West. Such being the case, the action of the Commissioner in denying recovery is clearly right.

With respect to port charges of $544.30 incurred by G. & H. at Key West, I am of the view that they were properly chargeable under the contract with Offshore and that recovery should be allowed therefor, with interest from the date that they were paid until the date of judgment.

With respect to the claim of Offshore, the principal items are its claim for detention at the rate of $4,200.00 per day for a period of ten days, and its cost of repairs to the barge. With respect to the former, I am of the view that the Special Commissioner was clearly right in disallowing this item in the absence of any proof that the barge lost any employment or that its drilling contract at Trinidad was in anywise adversely affected by the delay.

The principal question is that of the cost of the repairs. As is evident from an examination of the memorandum opinion of this Court of June 10, 1966, I was then of the view that the evidence on damages likely would show that the continued exposure of the barge to the salt water which had intruded both in her forward compartments and in her deckhouse had increased the damage, and occasioned additional repairs, which would not have been necessary had prompt action been taken for her relief. It appears, however, that there is substantial evidence which the Special Commissioner has credited that such was not the case; and that large quantities of salt water entered the deckhouse when the barge first began going down by the head. The findings that the damage was not increased by the delay

of the *Juno* in heading for a port of refuge finds ample support in the evidence.

There is admittedly due from *Offshore* to G. & H. the sum of $19,375.00 withheld on the towage contract, by way of anticipated set-off. G. & H. is entitled to recover this sum. As the amount is liquidated and became due at the the time of the towage, interest at the rate of 6% is allowed from that date to the date of decree.

G. & H. seeks to recover its attorneys' fees in this proceeding, and points to a provision in its written contract of towage providing essentially that court costs and attorneys' fees shall be added to its recovery where it recovers its towage charges after suit filed. Thus, this provision applies only to the cross-libel. Offshore's obligation and ability to pay the $19,375.00 has not been in controversy. The only contest here has been with respect to the libel of Offshore charging the *Juno* with fault in connection with the towing. I do not consider that G. & H. is entitled to attorneys' fees, and recovery of this item is denied.

The report of the Special Commissioner is confirmed. He has carefully analyzed and considered the issues presented, and the evidence. A fee for the Special Commissioner in the amount of $3,000.00 is fixed, and taxed as costs. Costs of court are taxed against the libellant. Proctor for G. & H. will prepare appropriate decree and forward same to proctor for Offshore for approval as to form. He will either approve or disapprove, in which latter event he will advise the Court in writing of his objections to the form of the decree.

APPENDIX C

Opinion and Judgment of the Court of Appeals for the Fifth Circuit

In The

UNITED STATES COURT OF APPEALS

For the Fifth Circuit

No. 25095

THE OFFSHORE COMPANY,
Appellant-Appellee,

versus

G & H OFFSHORE TOWING COMPANY, INC.,
(AND REVERSE TITLE)
Appellee-Appellant.

Appeals from the United States District Court for the Southern District of Texas

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(November 27, 1968)

Before GOLDBERG and CLAYTON,* Circuit Judges, and NOEL, District Judge.

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* Judge Clayton, the third judge constituting the court, participated in the hearing and the decision of this case. The present opinion is rendered by a quorum of the court pursuant to 28 U.S.C.A. § 46, Judge Clayton having taken no part in the final draft of this opinion.

PER CURIAM: The facts out of which this admiralty action arises and the reasons assigned by the district court for its decision are set forth in its opinion and its confirmation of the report of the special commissioner on damages. *The Offshore Company* v. *G & H Offshore Towing Company, Inc.*, ... F.Supp. ..... (S.D. Tex. 1968); also at 1966 AMC 2172 and 1967 AMC 1597. After thoroughly scrutinizing the record as a whole, we agree that the findings of the district court are not clearly erroneous, *B & M Towing Co.* v. *Wittliff*, 258 F.2d 473 (5th Cir. 1958), and that the authorities cited therein were governing and correctly applied. Our views being those of the district court, the judgments rendered by the district court are

AFFIRMED.

UNITED STATES COURT OF APPEALS

For the Fifth Circuit

October Term, 1967

No. 25095

D. C. Docket No. Adm. 64-H-88

THE OFFSHORE COMPANY,

Appellant-Appellee,

versus

G & H OFFSHORE TOWING COMPANY, INC.,
(AND REVERSE TITLE)

Appellee-Appellant.

Appeals from the United States District Court for the Southern District of Texas

Before GOLDBERG and CLAYTON*, Circuit Judges, and NOEL, District Judge.

November 27, 1968

* Judge Clayton, the third judge constituting the Court, participated in the hearing and the decision of this case. The present opinion is rendered by a quorum of the court pursuant to 28 U.S.C.A. § 46, Judge Clayton having taken no part in the final draft of this opinion.

Issued as Mandate: December 19, 1960.
Recoverable Costs:

Cost of Printing Brief of Appellee	$146.88
Attorney's Docket Fee Due Messrs. Royston, Rayzor & Cook	$100.00
Total	$246.88

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Southern District of Texas, and was argued by counsel;

On Consideration Whereof, it is now here ordered and adjudged by this Court that the judgments of the said District Court in this cause be, and the same are hereby, affirmed;

It is further ordered and adjudged that the appellant-appellee, The Offshore Company, be condemned to pay the costs of this cause in this Court for which execution may be issued out of the said District Court.

APPENDIX D

Proposed Interlocutory Decree

IN THE

UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

THE OFFSHORE COMPANY,
as owner of Drill Barge Rig 58,
Libelant,

v.

G & H OFFSHORE TOWING CO., INC.,
and the Tug "JUNO",
Respondents.

G & H OFFSHORE TOWING CO., INC.,
Cross-Libelant,

v.

THE OFFSHORE COMPANY,
Cross-Respondent.

ADMIRALTY NO. 64-H-

INTERLOCUTORY DEC

The above entitled cause and cross-cause having duly come on for trial on the 14th day of March, 1966, and Vinson, Elkins, Weems & Searls, by Robert M. Julian, having appeared for libelant (and cross-respondent), THE OFFSHORE COMPANY, and Royston, Rayzor & Cook, by M. L. Cook, having appeared for respondents, G & H Offshore Towing Co., Inc. and the tug JUNO (and for

cross-libelant, G & H Offshore Towing Co., Inc.), and said cause and cross-cause having been heard upon the pleadings and proofs of the respective parties, and the Court, after due deliberation, having filed its written opinion on the 10th day of June, 1966, setting forth its Findings of Fact and Conclusions of Law and directing that libelant recover from respondents the damage to Barge 58 or losses that resulted from the events that took place after the Barge was holed on or about January 17, 1964, in connection with respondents' delay in getting her to a port of refuge at Key West, Florida, after said Barge 58 was known by respondents to be down by her head and in need of assistance; and with respect to the cross-libel directing that G & H Offshore Towing Co., Inc. recover the unpaid balance due on the towage contract which was being withheld by The Offshore Company as an offset against its damages, together with whatever additional compensation that arose from the additional time, if any, required by the tug JUNO to complete the agreed towage which would result from the deviation of the tug JUNO to Key West if calculated on the basis that such deviation had commenced no later than noon on January 17, 1964, and had been completed without fault or delay on the part of the tug; NOW, THEREFORE, it is

ORDERED, ADJUDGED and DECREED that libelant, The Offshore Company, as owner of the Drill Barge Rig 58, recover of and from respondents, G & H Offshore Towing Co., Inc. and the tug JUNO whatever damages or losses it sustained that resulted from the events that took place after Barge 58 was holded on or about January 17, 1964, in connection with respondents' delay in getting her to a port of refuge at Key West, Florida, and after said barge was known by said respondents to be down by her head and in need of assistance, together with costs of court and inter-

est at six per cent (6%) per annum (after applying all offsets hereinafter mentioned to which respondents and cross-libelant may be lawfully entitled) from January 17, 1964, until paid; and

IT IS FURTHER ORDERED that the unpaid balance of Nineteen Thousand Three Hundred Seventy-five and no/100 Dollars ($19,375.00) due on the towage contract which is being withheld by The Offshore Company as an offset to damages to its Barge 58 as aforesaid shall be recovered by G & H Offshore Towing Co., Inc. pursuant to towage contract between the parties dated December 9, 1963, but shall be applied in payment of whatever damages are awarded to The Offshore Company pursuant to this decree, and G & H Offshore Towing Co., Inc. is further entitled to be compensated at the rate of $50.00 per hour plus Key West port charges pursuant to paragraph 6 of the said contract between the parties dated December 9, 1963, as compensation for the additional time, if any, that was required to complete the towage to Trinidad beyond the time such voyage would normally require as a result of the deviation into Key West, assuming for the purpose of calculating time, that such deviation commenced no later than noon January 17, 1964, and was completed in due course without fault or delay on the part of the tug, and such payment for additional towage and port charges shall also be applied as an offset to the losses sustained by The Offshore Company.

If the losses of The Offshore Company do not exceed the above mentioned amounts payable to G & H Offshore Towing Co., Inc., namely, the $19,375.00 due on the towage contract plus costs of putting into Key West, then G & H Offshore Towing Co., Inc. shall recover the excess from The Offshore Company.

IT IS FURTHER ORDERED that in the event the parties hereto cannot agree among themselves as to the quantum of damages they have sustained, the Court shall, upon application by either party upon notice to the other, appoint a special commissioner to ascertain and compute said damages and to report thereon to this Court.

Done at Houston, Texas, this ..... day of June, 1966.

.....
United States District Judge.

APPROVED AS TO FORM:
VINSON, ELKINS, WEEMS & SEARLS

By.....

Robert M. Julian

Proctors for libelant (and cross-respondent) The Offshore Company
First City National Bank Building
Houston, Texas

ROYSTON, RAYZOR & COOK
M. L. Cook

By.....

Proctors for respondents (and cross-libelant) G & H Offshore Towing Co., Inc. and the tug JUNO
877 San Jacinto Building
Houston, Texas

APPENDIX E

Interlocutory Decree

[294]

INTERLOCUTORY DECREE.

Filed Jul. 28, 1966.

In the United States District Court for the Southern District of Texas, Houston Division.

The Offshore Company, As Owner of Drill Barge Rig 58, Libelant,

vs.

G & H Offshore Towing Co., Inc., and the Tug Juno, Respondents,

G & H Offshore Towing Co., Inc., Cross-Libelant,

vs.

The Offshore Company, Cross-Respondent.

Admiralty No. 64-H-88.

The above entitled cause and cross-cause having duly come on for trial on the 14th day of March, 1966, and Vinson, Elkins, Weems & Searls, by Robert M. Julian, having appeared for libelant (and cross-respondent), The Offshore Company, and Royston, Rayzor & Cook, by M. L. Cook, having appeared for respondents G & H Offshore Towing Co., Inc. and the Tug Juno (and for cross-libelant, G & H Offshore Towing Co., Inc.), and said cause and cross-cause having been heard upon the pleadings and proofs of the respective parties, and the Court, after due delibera-

tion, having filed its written opinion on the 10th day of June, 1966, setting forth its Findings of Fact and Conclusions of Law and directing that libelant recover from respondents the damage to Barge 58 resulting from the delay in getting the barge to Key West, Florida; and, with respect to the cross-libel, **[295]** directing that G & H Offshore Towing Co., Inc. recover the unpaid balance due on the towage contract, together with whatever additional compensation arose from the additional time, if any, required by the Tug Juno to complete the agreed towage which would result from the deviation of the Tug Juno to Key West if calculated on the basis that such deviation had commenced no later than noon on January 17, 1964; Now, Therefore, it is

Ordered, Adjudged and Decreed that libelant, The Offshore Company, as owner of the Drill Barge Rig 58, recover of and from respondents, G & H Offshore Towing Co., Inc. and the Tug June, the damages, if any, resulting from the delay after noon on January 17, 1964, in getting the barge to Key West, and

It Is Further Ordered that cross-libellant, G & H Offshore Towing Co., Inc., recover from The Offshore Company the unpaid balance of Nineteen Thousand Three Hundred Seventy-five and No/100 Dollars ($19,375.00) due on the towage contract, and G & H Offshore Towing Co., Inc. is further entitled to be compensated at the rate of $50.00 per hour plus Key West port charges pursuant to paragraph 6 of the said contract between the parties dated December 9, 1963, as compensation for the additional time, if any, that was required to complete the towage to Trinidad beyond the time such voyage would normally require as a result of the deviation into Key West, assuming for the purposes of calculating time, that such deviation commenced no later than noon January 17, 1964.

[296]

It Is Further Ordered that the assessment and/or computation of the amounts due the respective parties hereto is referred to Ed Bluestein, Esq., Special Commissioner, who will take proof and report to the Court with convenient speed.

Done at Houston, Texas, this 28th day of July, 1966.

BEN C. CONNALLY,
United States District Judge.

Approved as to Form:

VINSON, ELKINS, WEEMS & SEARLS

By ROBERT M. JULIAN

(Robert M. Julian)
Proctors for Libelant(and Cross-Respondent), The Offshore Company.

First City National Bank Building
Houston, Texas 77002.

ROYSTON, RAYZOR & COOK,

By M. L. Cook,

(M. L. Cook),
Proctors for Respondents (and Cross-Libelant) G & H Offshore Towing Co., Inc. and the Tug Juno.

877 San Jacinto Building,
Houston, Texas 77002.

APPENDIX F

Corps of Engineers' publication, "Mississippi River Navigation," 1968 pp. 56

River Commerce

During World War II, Mississippi River transportation assumed an even more important role than ever before. The principal commerce on the lower Mississippi River consisted of the upstream movement of gasoline, oil, sulphur, and other products and materials vital to the war effort. In addition, 3,943 Army and Navy craft and other vessels for use in the war — destroyer escorts, fleet submarines, landing craft, freighters, tankers, and oceangoing tugs — moved from inland shipyards down the Mississippi to the sea.

In the ten years between 1956 and 1966, commerce on the Mississippi River between Minneapolis and the Gulf increased 86 percent; between St. Louis and Cairo, 103 percent; between Cairo and Baton Rouge, 108 percent; between Cairo and the Gulf, 92 percent; between Baton Rouge and New Orleans, 101 percent; and between New Orleans and the Gulf, 89 percent.

For the Mississippi River from Minneapolis to the Gulf of Mexico, a total of 193,950,405 tons was moved in 1966, representing 67,794,510,119 ton-miles, the equivalent of the transportation of one ton of freight around the earth at the equator about 2,722,452 times.

Tonnage for 1966 on the Mississippi River between St. Louis and Cairo was 46,398,038. The tonnage carried between Cario and Baton Rouge was 66,189,233, and between Cairo and the Gulf, it was 168,232,182. Between Baton Rouge and New Orleans 91,516,328 tons were moved in

1966; for the same year, 125,589,283 tons were transported between New Orleans and the Gulf.

Without question the Nation's principal river, the Mississippi is the main stem of a network of inland navigable waterways which form a system of about 12,350 miles in length, not including the connecting Gulf Intracoastal Waterway (of 1,173 miles) and its connecting inland and Gulf Coast streams. This giant waterways system includes the Ohio, Missouri, Illinois, Cumberland, and Tennessee Rivers, among others. It extends into the agricultural midwest, the industrial east, making Memphis, Vicksburg and New Orleans close neighbors of Pittsburgh, Kansas City, and Chicago. The importance of this may be realized when it is understood that, in 1966, the system supported traffic involving 321,756,407 tons and 106,375,962,417 ton-miles.

Heavy commercial traffic included grains, coal and coke, petroleum products, non-metallic minerals, metal products of all types, building materials, sand and gravel, salt, sulphur, and chemicals, among others. In addition to this traffic, many pleasure craft from all parts of the country now use the Mississippi River for vacation and travel.

Contributions to Development

The rapid growth in river traffic may be traced to many interdependent factors. One of the most important is the great improvement in the towboats and barges themselves. Carefully conducted research projects and much prototype experimentation have accounted for significant developments in transportation methods. Modern steel barges have a capacity of three or four times that of one packet boat. The average modern steam or Diesel towboats may push as many as twenty 1,000-ton steel barges at one time.

Integrated tows, developed several years ago, are becoming more and more numerous on the Mississippi. Made up of a bowpiece, a number of square-end barges, and a towboat, the entire unit is lashed together to form one streamlined vessel. The integrated tows vary in size, but one of the largest is nearly 1,200 feet long — longer than the largest ocean liner afloat. This tow often carries 200,000 barrels (35,000 tons) of petroleum products.

Towboats have become larger and much higher powered. For example, in the recent past the average towboat had about 500 horsepower. Today, the average is about 3,000 horsepower, with several towboats operating with more than 6,000 horsepower. The commercial towboat UNITED STATES is a 180-foot vessel which has four diesel engines and can develop 8,500 horsepower. The 9,000-horsepower, quadruple-screw M/V AMERICA, put into operation in 1960, has been declared the world's most powerful towboat. These sister ships are used primarily on the Mississippi River between St. Louis and New Orleans. On April 1962, the UNITED STATES moved a downbound tow of 52 barges carrying 43,000 tons of cargo. This tow was 245 feet wide, 1500 feet long overall, and covered an area of more than 7 acres, breaking a portion of the 1907 record set by the Steamer SPRAGUE, of 70,000 tons covering 6½ acres.

Equipped with Kort nozzles, contraguide rudders, and other modern marine equipment, today's towboats are powerful, efficient and fast.

Barges, too, have undergone radical changes. The standard barge for dry cargo is about 195 feet long and 35 feet wide; the liquid barge is usually about 295 feet long and 50 feet wide. These are designed to draft about 9 feet with a cargo capacity of about 1,500 tons for smaller barges and 2,500 tons for liquid cargo barges. In addition to increases

in size and carrying capacity, barges have been designed to carry specialized cargoes, such as crude pine gum, molten sulphur, asphalt, cement, chemicals, liquefied petroleum gas, and cattle.

Improved harbor and terminal facilities have also made enormous contributions to the growth in inland waterways traffic. Many port cities in the Mississippi Valley have constructed, or are building, modern river-rail-truck terminals, storage facilities, warehouses, and other improvements designed to accommodate the shipment of materials by water.

SUPREME COURT, U. S.

FILED

FEB 25 1969

JOHN F. DAVIS, CLERK

Supreme Court of the United States

OCTOBER TERM 1968

No. 1088

THE OFFSHORE COMPANY,

Petitioner,

– against –

G. & H. OFFSHORE TOWING CO., INC.,

Respondent.

SUPPLEMENTAL APPENDIX TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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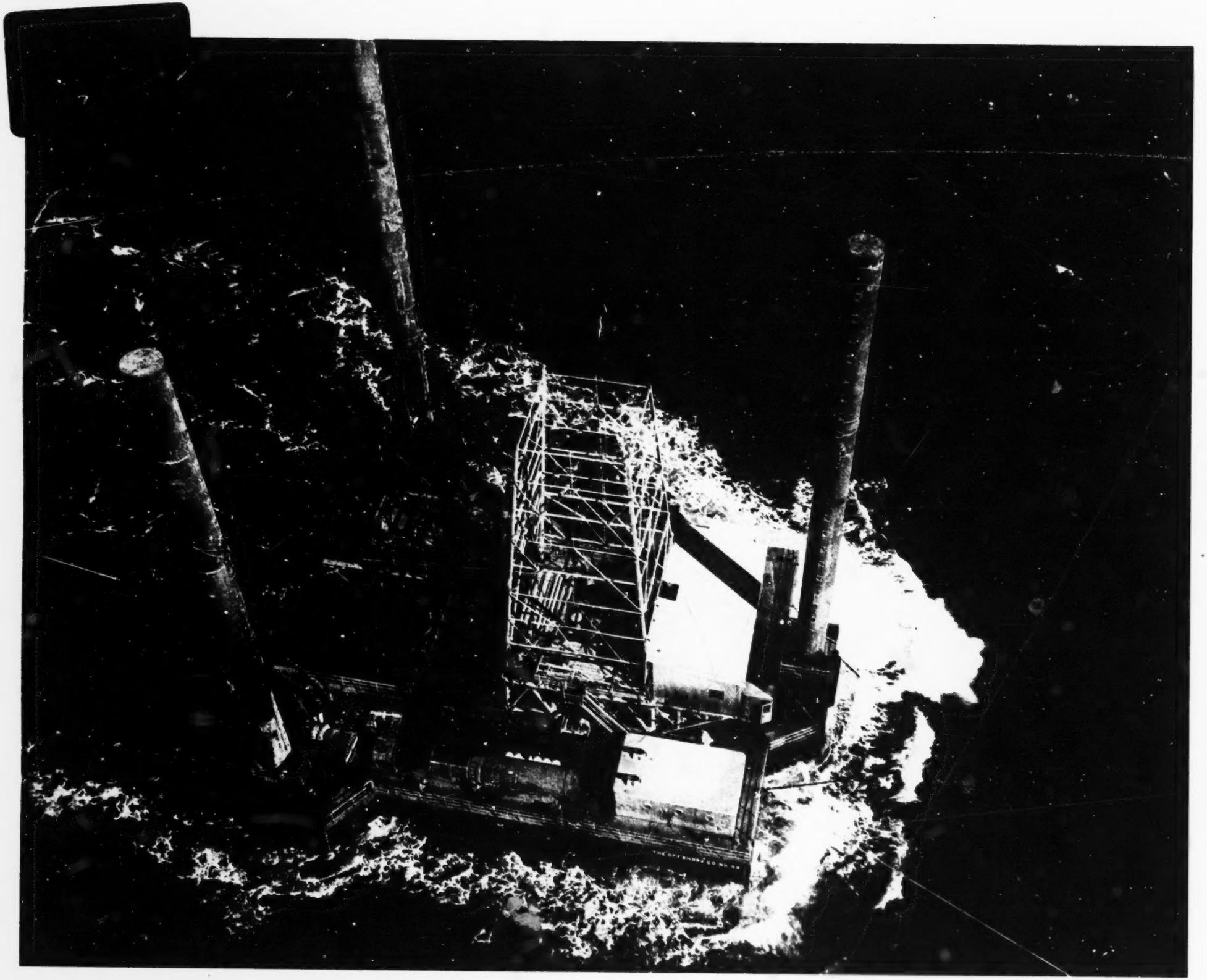

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IN THE

Supreme Court of the United States

October Term, 1968

No. 1088

THE OFFSHORE COMPANY, *Petitioner*

-against-

G & H OFFSHORE TOWING COMPANY, INC., *Respondent*

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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IN THE

Supreme Court of the United States

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-against-

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RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

INTRODUCTION

Respondent, G & H Offshore Towing Co. (hereinafter G & H), would show the Court that The Offshore Company's Petition for Writ of Certiorari presents nothing for review within the scope of Rule 19. It merely seeks a review of issues of fact which have been decided adversely to Petitioner by the District Court, the Special Commissioner appointed by the Court, the District Court again in its opinion confirming the report of the Special Commissioner and in a per curiam opinion by the United States Court of Appeals for the Fifth Circuit. There is

no real issue of law in the case and there is no conflict between the decision of the Court of Appeals here and the opinion of any other Court of Appeals. No question of general importance is involved. Although only a redetermination of facts is sought, at no place in the Offshore Company's Petition is there any reference to, or discussion of, the clearly erroneous rule.

STATEMENT

Under a towing contract G & H agreed to tow the Drill Barge 58 from Beacon No. 7 off Morgan City, Louisiana to Brighton, Trinidad. Under Paragraph 4 of that towing contract it was the obligation of The Offshore Company to properly fit out and maintain the tow for the towage and to comply with its surveyor's recommendations and The Offshore Company agreed to indemnify G & H and to hold it harmless from all loss, damage or liability arising out of or in any way contributed to by the unseaworthiness of the Barge 58.

The Barge 58 was substantially a rectangular steel box, approximately 100 feet long, 80 feet wide and 12 feet in depth.

The Offshore Company employed Surveyor Blakely to inspect the barge prior to the commencement of the towage operation, and there was no duty on G & H in respect of the seaworthiness of the barge. Thus, the statement found on Page 3 of The Offshore Company's Petition reading:

> "The JUNO's Captain, her officers and crew, without exception, all testified that at the time of delivery the barge was in good condition, thus making the testimony unanimous and establishing beyond doubt

> that the barge was in fact sound, seaworthy and entirely suitable for the proposed towage, and the district court so found. (353)."

has no validity.

None of the tug personnel boarded and inspected the Barge 58 prior to the commencement of the towage operation. All of their testimony was based on casual observation of the barge from the tug. None of them knew of the hole Blakely had overlooked in the after end of the generator room.

Apparently there is no dispute between the parties that the damage done to the generator house was the result of water entering through the drain hole in the after end of the generator house. See Offshore's Petition, Page 8.

After a full hearing, the Trial Court made findings of fact and conclusions of law which were incorporated in the Court's memorandum filed June 10, 1966. Among other things, the Court, speaking of damages found on the forward end of the barge, stated: (262 F. Supp. 282, at 285)

> "The damage had obviously been inflicted by some heavy object or objects which had come in violent contact with the hull during the towage."

The Court further specifically found that there was no negligence on the part of the tug in causing the original holing of the forward end of the barge. Parenthetically, this original holing caused only a very minor amount of damage. (Petition, p. 8)

The Trial Court did think there was some negligence on the part of the tug in not sconer proceeding to Key West and in the Interlocutory Decree decreed that The

Offshore Company was entitled to recover the damages, if any, resulting from the delay after noon on January 17 in getting the barge to Key West. That matter was then referred to Ed Bluestein, Esq., as Special Commissioner. After voluminous testimony was taken before the Commissioner, he found that no damages were occasioned to the barge by what the Court had said was a negligent delay, but found that all of the damages so complained about were due to the unseaworthy condition of the barge in that the hole in the after end of the generator house permitted the entry of the water that caused the damage. Oddly, The Offshore Company has not brought the testimony adduced before the Commissioner before this Court for review.

The Commissioner's Report and the evidence on which he acted was submitted to the Trial Court, who, by supplemental memorandum dated May 16th, 1967, among other things, stated: (R. 302)

> "The principal question is that of the cost of the repairs. As is evident from an examination of the Memorandum Opinion of this Court of June 10th, 1966, I was then of the view that the evidence on damages likely would show that the continued exposure of the barge to the saltwater which had intruded both in her forward compartments and in her deckhouse had increased the damage, and occasioned additional repairs, which would not have been necessary had prompt action been taken for her relief. It appears, however, that there is substantial evidence which the Special Commissioner has credited that such was not the case; and that large quantities of saltwater entered the deckhouse when the barge first began going down by the head. The findings that

> the damage was not increased by the delay of the JUNO in heading for a port of refuge find ample support in the evidence."

And further:

> "The report of the Special Commissioner is confirmed. He has carefully analyzed and considered the issue presented, and the evidence."

ARGUMENT

Under the captioned "Reasons for Granting the Writ" (page 11), Petitioner sets out nothing within the scope of Rule 19 for review by this Court.

COUNTERPOINT I.

The decision of the Court of Appeals for the Fifth Circuit is not in conflict with decisions of this Court or other Courts of Appeal.

It must be pointed out that, contrary to what Petitioner says, the Courts below did not hold that a tort feasor can avoid payment of damages for the reason that damages cannot be measured with exactness and precision. Instead, the Special Commissioner specifically held:

> "If there were credible testimony in the record that the delay in all probability substantially increased the damages, a recovery by Offshore would not be withheld because no exact or precise computation could be made of the increased amount. It would suffice that some reasonably reliable basis was shown upon which an apportionment could be made. Moreover, recovery should not be withhheld under circumstances where the damages caused by a negligent

party cannot be separated or apportioned, for to do so would penalize the innocent party to the relief of the guilty one.

This record, however, lacks evidence to establish (1) that the negligence of G & H caused additional damages, . . . Offshore's burden initially was to establish (1) above. It did not do so." (Report of Special Commissioner, Page 14).

The above excerpt shows beyond doubt that the Courts below did not deny recovery for the reasons stated by Petitioner and show that the cases cited in Reason 1 have no application here. Found facts based upon evidence, were that Respondent did not negligently cause *any* damage to Petitioner's barge. The District Court held

(262 F. Supp. 282, 287) that the original cause of the holing was that of floating objects, a peril of the sea over which neither party had control. The Commissioner then held, and was affirmed in so holding by the District Court (287 F. Supp. 724), that no damages were attributable to the negligence of Respondent for not deviating once the barge was ascertained to be in some trouble. Petitioner's "conflicting cases" deal with apportioning damages once demages are determined. In the case at hand, however, there were no damages attributable to the Respondent's negligence and so there was no apportionment necessary.

Petitioner cites several cases with which it claims the Fifth Circuit opinion conflicts, but, on careful reading, it is found that this is certainly not the case. *The Mason,* 249 F. 719 (2d Cir., 1918), noted in Offshore's Petition at page 12, is representative of the cases Petitioner cites. In that case, on two separate occasions a steamboat had suffered a stranding. The Claimants of the tug involved

had admitted that they had caused some damage. In *The Mason,* "The single issue . . . was whether the damage to a particular part of the ANDREWS' bottom was caused by the stranding of March, 1909." 249 F. 719, 720. There was no question of whether there had actually been damage as there was in the case at hand. Petitioner's other cases are likewise distinguishable:

1. *Navigazone Libera T. S. A. v. Newtown Creek T. Co.,* 98 F.2d 694 (2d Cir., 1938). Here again there was no question of initially finding damages. The problem was one of segregating damages to the propeller of the ship from those to the propeller bushing and adjacent parts.

2. *Nassau Sand and Gravel Co., Inc. v. Red Star Towing and Transportation Co., Inc.,* 62 F.2d 356 (2d Cir., 1932) states, in recognizing that there must first be a finding of negligence, "When the wrong is once proved *and the damages resulting from it*", then the burden is on the tort feasor to apportion (62 F. 2d at 357, emphasis added).

3. *Story Parchment Company v. Paterson Parchment Paper Company,* 282 U.S. 555, 75 L.Ed. 544 (1931). In this case under the Sherman Anti-Trust Act, a jury found there were actual damages, again unlike the case at hand. In fact this Court specifically recognizes that the damages must be attributable to the wrong before the Petitioner's arguments are effective when it states: "The rule which precludes the recovery of uncertain damages applies to such as are not the certain result of the wrong, not to those damages which are definitely attributable to the wrong and only uncertain in

> respect of their amount". (Citation omitted 282 U.S. 555, 562). Therefore, first it must be shown that damages definitely result from the wrong.

Thus, it can be seen that when the Special Commissioner found that "No testimony or proof was offered . . . upon which (a finding of damage) could reasonably be based" (Special Commissioner's Report page 14, parenthetical expression added), then this effectively distinguishes all of the cases which Petitioner cites, as well as refutes Petitioner's claim in the first paragraph of his first argument that damage actually resulted from the JUNO's action or inaction. What Petitioner and the cases he cites are speaking of was not even at issue in this case since there was no finding that Respondent's negligence caused any damages. Therefore, there was no need to apportion the damages in anyway whatsoever and Petitioner's cases are clearly inapposite.

COUNTERPOINTS II AND III.

The decision of the Court of Appeals for the Fifth Circuit is not in conflict with the decisions of other Courts of Appeal on the question of inferences to be drawn in connection with damages to a tow or on the question of application of the doctrine of *res ipsa loquitur* in admiralty in this factual context.

As the District Court pointed out in its first opinion in the instant case, *Sternberg Dredging Co. v. Moran T. and T. Co.*, 196 F.2d 1002 (2d Cir., 1952), *Detyens v. Marine Industries, Inc.*, 349 F.2d 357 (4th Cir., 1965) and *The Anaconda*, 164 F.2d 224 (4th Cir., 1947), cases with which Petitioner alleges this case conflicts, are cases in which the question was whether "The incident causing

the damage was of such nature that it would not normally have happened had the tug exercised due care". The Court continues, "In my judgment that is not the case (in Offshore v. G & H)". (262 F. Supp. 282, 287). The District Court held that the original damage occurred from floating objects on the night of June 16-17. When the Special Commissioner later determined that no damage resulted from delay, his finding meant that the holing of the barge by floating objects was the cause of all the damage.

In *American Bridge Division, United States Steel Corporation v. Roen Steamship Company*, 328 F.2d 838 (2d Cir., 1964), as well as in the *Sternberg* opinion, the Court did not hold that there was any burden of proof upon the tug until the tow had made out a *prima facie* case of negligence against the tug. The District Court opinion, affirmed on appeal, states:

> "Once the fault of the tug is established, however, the burden is upon the 'tug' to show that none of the courses of action . . . would have succeeded in keeping the barge from capsizing". 216 F.2d 353, 361.

The Court of Appeals' decision in *Roen* indicates that there was insufficient evidence introduced by the tug to hold that the tug was not guilty of negligence, while in the instant case there is evidence sufficient to explain the damage to the Offshore 58 in ways other than the tug's negligence.

Another case cited by Petitioner, *Chemical Transporter, Inc. v. M. Turecamo, Inc.*, 290 F.2d 496 (2d Cir. 1961), is distinguishable as the excerpt from it cited by Petitioner clearly demonstrates. There the fault of the first vessel, a barge with a hole in it, appeared early enough for the

second vessel, a tug, to avoid the damage. To the contrary, in the case at hand, the Special Commissioner found that the damage was already done before the JUNO was negligent and that no further damage was caused by the JUNO's negligence.

The finding by the Court that the floating objects probably caused such damage as was done to the barge is not "clearly erroneous" under Fed. Rule Civ. Proc. 52 (a). This finding established the cause of the damage, hence the doctrine of *res ipsa loquitur* is not applicable. The occurrence was explained and there was no need to have the tug explain further, especially when, due to the circumstances, it was in no better position to do so than the barge itself.

Once again, the cases on inferences to be drawn and on *res ipsa loquitur* cited by Petitioner are distinguishable from the case at hand. *The Anaconda* was distinguished by the District Court as pointed out above, while in *Appeal of Cahill*, 124 F. 63 (2d Cir., 1903), *Coleman v. Aiken*, 242 F. 239 (5th Cir., 1917) and *The Joseph F. Clinton*, 250 F. 977 (2d Cir., 1918), tugs abandoned tows and the burden was placed on the tugs to show efforts to recover the tows. In those cases, the abandonments were held to be negligent, while in the case at hand, the acts of the Respondent prior to noon January 17, 1964, had nothing to do with the damage and the delay after noon caused no damage. The ever present fact of this matter is that even if all the inferences as to negligence made Respondent negligent, still no damages resulted from that supposed negligence.

Petitioner's reliance on *Bisso v. Waterways Transportation Co.*, 235 F.2d 741 (5th Cir., 1956) is also misplaced.

As the portion of the case cited by Petitioner shows, the rule that the tug must explain the accident applies only when a casualty "occurs under circumstances which ordinarily results (sic) in no such casualty". (Offshore's Petition, page 18). This clearly was not the case here as the District Court stated in distinguishing the *Sternberg* opinion among others (262 F. Supp. at 287) and as was set forth above.

COUNTERPOINT IV.

The decision sought to be reviewed is one which rests solely on factual determination and is not one of general importance or of substantial concern to the shipping public.

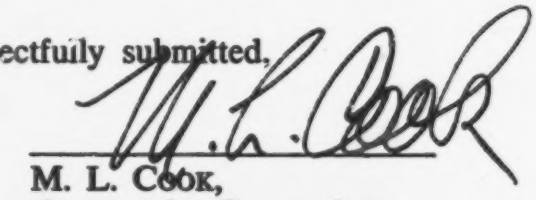
The issue here was simply one of damages inflicted in the particular factual context. The two Courts as well as the Special Commissioner below were correct in their analysis and resolution of the issue of liability and damages. At no point in its petition does Petitioner assert that the findings by the Court or Special Commissioner were "clearly erroneous". This case turns solely upon its own facts and therefore is not one this Court should review.

The Trial Court thought the Tug JUNO was negligent only in delaying after noon on January 17th, 1964. Referral to a Special Commissioner for ascertainment of damages resulted in the finding that no damages resulted from the tug's negligence. Thus, since no attack has been made on the Special Commissioner's findings there is nothing of importance for this Court to consider.

CONCLUSION

The decision below is correct, involves no question of general importance, and there is no conflict between the Courts of Appeal or any other reason why this Court should review the case. Therefore, it is respectfully submitted that the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,



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